No. 11376

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE HOME INSURANCE COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as BARNES-WOODIN FUR DEPARTMENT,

Appellee.

No. 11376

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON
JOHN GAVIN
WALTER J. ROBINSON, Jr.
Attorneys for Appellant
426 Miller Building,
Yakima, Washington

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JURISDICTION

This action was removed to the federal district court by reason of diversity of citizenship. U.S.C.A. title 28, sec. 41(1), 71, 72. Plaintiff is a resident of the State of Washington; defendant is a corporation incorporated in the State of New York; and the amount sued for was $22,495.00, exclusive of interest and costs. (R. 3-20).

The case comes within the usual appellate jurisdiction of this Court upon appeal from final judgments in actions at law or in equity. U.S.C.A. title 28, sec. 225. Final judgment and decree was entered in the district court on May 14, 1946. Notice of appeal therefrom was filed on June 19, 1946. (423-425).

STATEMENT OF THE CASE

This is an action brought by appellee, Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, against appellant, The Home Insurance Company of New York, to recover upon an inland marine insurance policy for the destruction of customers' fur coats in appellee's custody, by a fire on May 9, 1944, at 5:35 o'clock p. m., on the mezzanine floor of the Barnes-Woodin department store, at Yakima, Washington.

The case was tried to the court without a jury. The court made findings, denied defendant's motions for judgment and for new trial, and entered judgment and decree

in favor of plaintiff in the sum of $19,086.45 and costs. Defendant appeals.

It appeared from appellee's complaint that he had made no settlement with six of the fur coat owners, Clara Harbin, et al, and consequently appellant before filing its answer upon motion procured an order of the court adding those six persons as additional third-party defendants. Appellant thereupon served and filed its answer and counter-claim for interpleader as to appellee and said additional third-party defendants, appellant having reserved $1800.00 of its admitted unpaid liability. However only one of said additional third-party defendants entered any appearance and none of them appeared at the trial, for the reason that each of them held other insurance and received payment therefrom (22-36, 146, 326). Consequently the court entered judgment of default as against them; and no issue as to them or as to appellant's counter-claim for interpleader is involved on this appeal.

No rights of any customers or fur coat owners are involved herein. Aside from the six coat owners who were made additional parties defendant and defaulted, appellee, prior to the commencement of this action, made settlement with all of the owners of damaged fur garments, either by cash payments or by replacing their fur garments. The issues herein are solely between appellee Kirkevold and appellant.

Appellant conceded liability by reason of said fire in the sum of $10,000.00, of which it paid $8200.00 to appellee prior to the commencement of this action. (7, 385) Appellant very definitely contends, however, that it is not liable for more than the remaining balance in the sum of $1800.00 (less of course its costs in both courts). Appellant's contentions and the issues herein are based upon the hereinafter quoted provisions of the insurance policy contract, which imposed several express and very definite restrictions and maximum limitations upon the amount of appellant's liability.

The basic facts of this case—as distinguished from the inferences and conclusions to be drawn therefrom—are for the most part not substantially in dispute and may be summarized as follows:

The Barnes-Woodin department store is situated at 301 East Yakima Avenue, in the heart of the business district of Yakima, Washington. It was sold by the Barnes-Woodin Company to C. C. Anderson Company, of Boise, Idaho (a subsidiary of Allied Stores, of New York), effective as of May 1, 1944, eight days before the fire. (238) Both prior and subsequent to said sale, appellee Kirkevold, through a continuing arrangement with said store, owned and operated the fur department therein, situated partly on the mazzanine floor and partly on the second floor of the store.

On August 17, 1942, appellant issued to appellee this insurance policy contract termed "Furriers-Customers Basic Policy," being No. FC-1824, which was in effect at the time of the fire, and which contained the following important provisions:

"FURRIERS-CUSTOMERS CUSTODY RIDER

"*This policy only covers Furs,* or garments trimmed trimmed with Fur, being the property of customers, accepted by the Assured for storage, alteration, repairing, cleaning or remodeling *and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property,* but excluding any stock belonging to the Assured or to any subsidiaries or affiliates of the Assured.

"This policy covers during transportation or otherwise while the property is in the custody or control of the Assured for alteration, repairing, cleaning, remodeling, *or preparation for storage* or for return to customers; *and while in storage rooms, vaults or safes* at locations hereinafter described.

"This Policy Insures:

"Against all risks of loss of or damage to the insured property including the Assured's legal liability therefor, *except as hereinafter provided . . .*

"2. *This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise, nor in any event for more than the cost to repair or replace the article with materials of like kind and quality, provided always that this Company shall not be liable in any one casualty for more than the limit*

of liability as stated below for the location at which such casualty occurs:

"Limits of Liability

"In storage rooms, vaults and safes	*Outside of storage rooms, vaults and safes*
$100,000.00	*$10,000.00*

Locations
at 301 E. Yakima Avenue,
Yakima, Washington

nor for more than $5000.00 while at any other location not used by the Assured for storage, nor for more than $5000.00 while in transit.

"3. *It is warranted by the Assured that an accurate record will be kept of all receipts issued showing the customers' name, address and description and stipulated amount on each article included therein,* which record shall be open for inspection by duly authorized representatives of this Company at all reasonable times during the policy period and for one year thereafter." (Pltf. Ex. 1; 44-54). (All italics herein are ours.)

Appellant contends that under the plain terms of said contract its liability was definitely limited in the following respects:

1. The customers' fur coats destroyed in said fire were situated *outside of storage rooms, vaults, and safes. Consequently appellant's total liability could not in any event exceed the sum of* $10,000.00. Appellant is therefore not liable for more than $1800.00, in addition to the $8200.00 heretofore paid by it to appellee.

2. Moreover as to any particular customer's fur coat

or garment appellant's liability *cannot exceed the amount stipulated in the receipt* issued by appellee to such customer as applying to said fur garment.

3. Appellee made settlement with all of the owners of damaged fur coats, except the six additional third-party defendants hereinabove referred to. Numerous settlements were made in cash for the amounts shown on the releases signed by the customers. (Pltf. Ex. 3; 68) Numerous other settlements were made by replacing the destroyed fur coats. As to the latter, appellant's liability to appellee under the contract *cannot in any event as to any particular coat exceed the cost to appellee, a fur coat merchant, "to repair or replace the article with materials of like kind and quality."*

4. In the instances where cash settlements were made naturally appellant's liability to appellee *cannot exceed the amounts paid by appellee in making the settlement* with the coat owners, as shown by the releases signed by them and delivered to appellee. (Pltf. Ex. 3; 68)

5. Nor can appellant's liability as to any coat exceed the *amount claimed therefor in the proof of loss* filed by appellee with appellant, which itemizes the amount claimed as to each customer's fur coat. (Pltf. Ex. 2; 58-66).

The judgment entered by the trial court seriously violates each of the foregoing maximum limitations upon

appellant's liability, both collectively and as to each particular coat, to which limitations appellant is under the contract clearly entitled.

It is undisputed that the uppermost rider or endorsement attached to the policy as introduced in evidence, increasing the policy limits, was issued and attached to the policy subsequent to this fire. (44, 55).

The policy also provided and it was arranged that a fur coat customer might, upon payment of an additional consideration, obtain from appellee the issuance of appellant's "certification of insurance on furs", sometimes referred to as "insurance certificate" or "floater policy." The advantage thereof to the customer was that the same gave insurance protection for the coat *at any location,* whether or not in the custody of this store. Thirteen of the owners of coats damaged in this fire held such certificates. (137). The term "Assured' in the policy refers to appellee. The policy contains the following endorsement or rider with reference to these certificates:

"FURRIERS' CUSTOMERS CERTIFICATION ENDORSEMENT

"1. This policy is extended to cover during transportation or otherwise such Furs or garments trimmed with Fur, the property of customers, for which the Assured has issued a Certification of Insurance, on form approved by this Company. No Certification of Insurance issued shall cover beyond the time the ownership re-

mains vested in the person to whom issued, nor shall any Certification be issued for a period longer than twelve (12) months from the date of issuance.

"2. It is agreed by the Assured that Certifications of Insurance *shall be issued only in combination with annual storage agreements at a combined storage and insurance charge,* and that the rate and premium applying to this insurance shall not be stipulated as such on any Certification, bill, circular or advertising matter.

"3. The additional premium for the insurance granted by this endorsement shall be computed at the rate of Fifty (50c) cents per $100 per annum of the amount stipulated on each Certification issued. Such additional premium to be paid monthly on or before the 15th day of the month following the issuance of such Certifications.

"4. The Assured agrees to forward to this Company or its Agent at the close of each business day copies of all Certifications issued.

"5. The cancellation of this policy shall not affect any risk then pending under Certifications issued by the Assured as herein provided. It is understood and agreed that any one or all Certifications may be cancelled at any time by the Company, giving five (5) days' written notice thereof, mailed to the address of the person to whom issued as stated in the Certification, and unearned portion of paid premium to be returned to the Assured.

"*Subject to all terms, conditions and warranties of the policy and its rider to which this endorsement is attached.*

"Attaching to and forming part of Policy No. FC 1824 of the HOME INSURANCE COMPANY." (Pltf. Ex. 1; 45-47).

The policy further provides:

"*This policy is made and accepted subject to the foregoing stipulations and conditions* and to the conditions printed on the back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and *no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy* unless such waiver, if any, shall be written upon or attached hereto, *nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured* unless so written or attached." (Pltf. Ex. 1; 51).

The policy contained no such written waiver agreements or attachments.

The material portion of the form of "Certification of Insurance on Furs" issued by appellee to its customers on request pursuant thereto is as follows:

"CERTIFICATION OF INSURANCE ON FURS.
"POLICY NO. F.C.-1824."

"This certifies that..... (CUSTOMER)
..... (STREET ADDRESS) .....
.....(CITY AND STATE)*is insured under the above designed policy* against all risks of loss of or damage to the Fur garments below scheduled, except as hereinafter provided, covering for twelve (12) months from date hereof, provided such garments remain the property of said customer, *subject in all respects to the terms and conditions of said policy issued* by

THE HOME INSURANCE COMPANY, NEW YORK

TO

MERYL KIRKEVOLD DBA BARNES-WOODIN FUR

DEPT., YAKIMA, WASHINGTON Assured . . .

"The insurance evidenced by this Certificate *is cancelable by the Company in accordance with the terms of said policy.* In event of loss, immediate notice must be given in writing to the Company or the Assured named above. Failure to file proof of loss within ninety (90) days from the date of loss invalidates claim. *Any loss may be adjusted by the Company with the assured or with the holder of this Certificate.*

"No suit or action is maintainable under the policy unless *all terms thereof* are compiled with.

Items Covered	Description	Amount of Insurance.....

"STORAGE PRIVILEGE—

"The Assured agrees to accept for storage for a consideration, the property above described, at such time and for such period within the term of this Certification as the holder thereof may elect, *at any agreed value* as of this date corresponding to the amount of insurance for each of the items covered hereby, as indicated above, and *subject to the terms and conditions of its standard storage receipt,* which will be issued for said property when same is delivered to it.

BARNES-WOODIN FUR DEPT. Signature of Assured." (Pltf. Ex. 3; 68).

The only storage room or vault for the storage of fur garments was situated on the second floor of said store. Approximately 600 fur coats were stored there at the time

of the fire. (164) This storage room was at all times kept locked and subject to refrigeration or air-cooling machinery. (165). As is well known, the Yakima Valley is during summers an extremely hot, dry, arid district, so that cooling is necessary for proper storage of furs. (165, 166, 283). There were no refrigeration or air-cooling devices whatever on the mezzanine floor of the store. (165).

IT IS UNDISPUTED THAT NONE OF THE FUR COATS IN THE STORAGE ROOM ON THE SECOND FLOOR OF THE STORE WERE IN ANY WAY DAMAGED BY THE FIRE. THE ONLY FUR COATS DAMAGED BY THE FIRE WERE SITUATED ON THE MEZZANINE FLOOR. THE DAMAGED COATS WERE NOT SITUATED IN ANY STORAGE ROOM, BUT WERE IN APPELLEE'S WORK ROOM. (118, 164, 167, 186).

The mezzanine floor of the store was reached by a stairway ascending from the main street floor of the store. The space on the mezzanine floor to the left or west at the top of this stairway was used as a "sales room" for the sale of new fur coats. This space, however, was not a separate room, but was merely part of the open space of the store proper on the mezzanine floor. It was not partitioned off in any manner from the rest of the main store. (161-162, 252-253, 269).

Adjacent to and immediately to the west of this sales space was the work room or fitting room, being the space

in question. It was in this latter room that the fire originated, and through the prompt and diligent efforts of the city fire department, the fire was for the most part confined to that room. All of the fur garments destroyed or damaged in the fire were situated in the latter room, namely, this work room. (118, 164, 167, 186).

Along the southerly edge of the mezzanine floor there was a partition between the work room and the remainder of the store. There was so such partition between the sales room and the remainder of the store. There was no door between the sales room and the work room, but merely an opening or passageway about four feet wide covered by a curtain or drape with an opening through which people readily walked. (161-2, 269-70, 276-7) There was no wall between the sales room and the work room, but merely show cases in which new fur coats which were for sale were hanging in the sales room. (162, 269-70, 276-7).

The work room was a rather irregular shaped room, of which the easterly portion contained various sewing machines, tables, chairs, etc., and was used for repairing, remodelling, and fitting fur garments. The garments were temporarily hung in the westerly portion of the work room, usually for several weeks during the busy season, until they could be reached to be worked upon. It was customary to carefully examine and do some repair work upon each fur coat before placing the same in storage. *It is undisputed that*

no partition of any kind separated the said easterly and westerly portions of this work room. (160, 219-20, 272-3).

It is also undisputed that after completion of the repair work on each fur coat, the fur garments that were left for storage (as distinguished from those which were brought in for repairs only) were thereupon always placed "in storage" in the storage room upstairs on the second floor of the store. (121-4, 126, 166-7, 182, 201, 206, 220, 224-5, 228-31, 234-6, 282-3).

It was customary to refer to the coats as "in storage" only after they had been placed in the storage room on the second floor. (229).

An abnormally large number of fur coats had been received due to the coming of warmer weather shortly before the fire, and the same were then hanging in the work room waiting to be worked upon and then placed in storage in the storage room on the second floor. (135, 173)

Also appellee was then spending most of his time at his war-time ranch (probably to obtain an agricultural classification exemption) and he and his employees were not keeping up with their work. (135, 175, 186, 320).

Shortly prior to the issuance of this policy appellee signed in two places and submitted to appellant his written application for the policy, *which in two places definitely stated that he had only one place for storage of customers'*

fur garments, and that the same was not on the mezzanine, but was on the second floor of the store. This application (Deft. Ex. A; 169-171, 187-189) provided:

". . . 6. *Locations (all) used for storage of Customers' Property:*

Address	*Floor*	Building or Section	Operated By
A. 301 E. Yakima Ave., Yakima, Wn.	*2nd*		Barnes - Woodin Fur Dept.
B.			
C.			
D.			

"NOTE: *Separate "Description of Storage Enclosure and Location" Rider must be completed for each Storage Enclosure,* except where storage is at premises NOT operated by Proposer; then it may be omitted unless or until specifically requested by Company.

"7. With respect to storage location NOT OPERATED BY PROPOSER, specify,

(a) Those at which a separate storage enclosure is maintained for Proposer's exclusive use *(this refers to an entire vault or room, not to a stall or other subdivision thereof*.....

.....

(b) Any which may be in same building (but under a different street address) with Proposer's principal place of business.....

INSURANCE

"Section Two (Forms and Limits needed)

"1. BASIC POLICY (Custody form only):
Limits of Liability:
(a) *At Locations where Customer's Property is Stored*

"Location	In Storage Enclosure	Outside Storage Enclosure
301 E. Yakima Ave.	$100,000	$ 10,000
	$	$
	$	$
	$	$

"(b) At Location NOT USED for STORAGE
Proposer's Premises . . . . . $.....
While in Transit $5000
At Any Other Location $5000

"... Signing this Proposal does not bind the Proposer to complete the insurance, but *it is agreed that the information contained herein and in the "Description of Storage Enclosure and Location" Rider (S) attached hereto shall be the basis of the contract should a Policy be issued. If any of the questions therein have been answered fraudulently, or in such a way as to conceal or misrepresent any material fact or circumstance concerning this insurance or the subject thereof, the entire Policy shall be void.*

"I/We have read the above and the "Description of Storage Enclosure and Location" Rider (S) attached hereto and agree that to the best of my/our knowledge and belief same fully represents the true statement of facts.

(Signed) MERYL W. KIRKEVOLD,
Signature of Proposer

Owner .....
Title

Date 8/20/42

"ATTACH DESCRIPTION OF STORAGE ENCLOSURE AND LOCATION RIDER(S) HERE.

"DESCRIPTION OF STORAGE ENCLOSURE AND LOCATION

(To be attached to Furrier's Customer's Proposal)

"Description of Storage Location at 301 E. Yakima Ave. is as follows:

1. STORAGE LOCATION GENERALLY:

Construction of Building (i. e., Frame, Brick, Mill, Reinforced Concrete, etc.) B Class Bldg. Page 91, line 17.

On which floor is storage enclosure located (i. e., basement, first, second, etc.) *Second.*

". . . 3. STORAGE ENCLOSURE ONLY:

(a) Size..... Width 20, Length 20, Height 12.

(b) Number of Openings: Doors, 1; Windows..... Vents.....

(c) Construction of Walls, Floor and Ceiling:

Material	WALLS	FLOOR	*CEILING*
"Wood and/or Plaster Board	Thickness 6 inches	Thickness 12 inches	Thickness 12 inches
". . . (d) *Description of Doors of Storage Enclosure*		OUTER DOOR	INNER DOOR
(a) State type (ordinary, refrigerator, fire or vault).....		*ordinary with steel covering*	
(b) Name of Manufacturer.....			
(c) State classification of Underwriters Label.....			
(d) If refrigerator or fire door state thickness		inches	inches
(e) If Vault Door			
(1) State thickness of steel exclusive of bolt work		¼ inches	inches
(2) Is door equipped with combination lock?.....		no	
(3) Lock Manufacturer's Name and Number.....			
(f) *If not equipped with combination lock, describe lock*		*Key lock Sargent*	

Date 8/20/42

MERYL W. KIRKEVOLD,
Signature of Proposer"

This conclusively shows the intention of the parties that the coverage should not exceed $10,000.00 as to furs outside of the storage enclosure on the second floor. Also that only entire enclosed rooms and not subdivisions of rooms should be considered.

Appellee admitted that the said room description referred to the second floor storage room and not the mezzanine. (188-9).

The receipt *issued by appellee* to Mrs. F. C. Dawson listed her three fur garments and stated that the third garment was "*in storage.*" This referred to her coat which was in the storage room on the second floor and was undamaged by the fire. Her other two coats were in the work room on the mezzanine floor and were seriously damaged by the fire. (Pltf. Ex. 3; 68).

The same is true as to the three fur garments of Mrs. David Thomas. Appellee issued to her a receipt which states that her third garment was "*in storage.*" This was her coat which was in the storage room on the second floor and was undamaged by the fire. (Pltf. Ex. 3; 68).

Appellee also introduced in evidence a letter from another customer, Mrs. A. K. Warner, which stated that she understood her coat had been left there only on May

6 (three days before the fire) and that it had not yet been placed *"in storage."* In other words, it was still being held in the work room for repairs *and for preparation for storage.* (Pltf. Ex. 3; 68).

A few days after the fire appellee admitted to Ralph B. Sinclair, one of the insurance adjusters, that his $10,000.00 insurance coverage was insufficient to cover the amount of the loss of customers' fur coats in the fire. Kirkevold also stated to Sinclair that he was going to ask Mr. Orkney, the agent through whom the policy was issued, to request the insurance company to make up the difference between the amount of the insurance and the amount of the actual loss, if possible. He further stated that he expected to make profits on replacements of damaged fur coats, which would partially, at least, reduce or offset the deficiency remaining between the amount of the fire loss and the amount of the insurance coverage. (254-258, 262, 263).

Appellee's own testimony conclusively shows that these damaged coats were in the work room. He testified:

"Q. Now, Mr. Kirkevold, where were these coats at the time they were destroyed?

"A. At the time when the coats were destroyed, was *in our working quarters,* and also a room where we had coats hanging ready to be worked on." (118)

This room where the damaged fur coats were was re-

peatedly, expressly, and definitely designed by appellee himself as *"the work room."* (118, 120, 124, 160-1, 167, 186, 196-7, 201, 235, 270-1) Kirkevold also so designated the room on the diagram of the mezzanine floor. (Pltf. ex. 5; 159-60).

Kirkevold testified:

"The room upstairs was reserved for storage—paid storage." (122)

"Q *What you call the cash paying, or permanent storage room was on the second floor?*

"A. *Yes."* (124)

Appellee admitted, and it is undisputed that aside from the receiving room or shipping room in the basement and the space for cleaning fur coats on the second floor—in each of which coats were never kept more than a few hours, and there were never more than a very few coats there at any time—*the only places in the entire store where customers' fur coats were ever kept were this work room on the mezzanine floor and the storage room on the second floor.* (129, 130, 176-7).

The cause of the fire has never been definitely determined, although probably due to an employee's lighted cigarette. (176, 215). Appellee had four employees working in the work room where the fire started and where all of the damage occurred. *There were no employees in the*

storage room upstairs on the second floor; and that room was kept locked. The store closing time was 5:30. The fire started immediately afterward. (57, 175, 176).

After the fire, appellee increased the amount of his insurance coverage outside of the storage room. (Pltf. ex. 1 rider; 44, 55, 133, 183). Of course, however, this did not aid him as to this fire.

Appellee on redirect examination further testified, relative to certain pictures of the store interior:

"Q. I hand you 9-B, showing some dummies in the middle of the picture. Were those dummies normally in that position?

"A. No.

"Q. Where would they be?

"A. They would be over in this portion of *the work room.*

"Q. *In your work room?*

"A. *Yes.*

"Q. And that shows the partition you built along the balcony in 1943?

"A. Yes.

"Q. And those were the coats that were being worked on that you referred to, a rack being worked on?

"A. Yes.

Q. These would be the sewing machines?

"A. Yes.

"Q. Handing you 9-D, where would that be taken from?

"A. Oh, this is the picture that you just showed me, only it is from the other end. I mean, it is *the other end of the room.*

"Q. You mean, this would be *in your storage room?*

"A. *No.*

"Q. *That is a picture of the work room?*

"A. *Work room.*" (196, 197).

Kirkevold further testified:

"Q. *Well, it was very evident that the fire was in the work room, wasn't it?*

"A. *Well, that is where all of the damage was done.*" (186).

Mrs. Hazel Fiebelkorn, one of appellee's employees in the work room, and one of his witnesses, testified:

"I work in *the work room . . .*

"Q. Were you in charge of *the work room?*

"A. *Yes . . .*

"Q. And then what would be done with it?

"A. Well, it would probably be worked on or whatever

had to be done to it, and finished up, *and put in storage.*

"Q. *And put in storage where?*

"A. *On the second floor . . .*

"Q. Let us say that a coat was brought in, not for permanent—not summer storage, but for repair, state what would be done with that coat?

"A. It would probably be *hung back there in the work room until we were notified as to what she wanted to do, come in and get it or for storage.* It would probably hang there until they showed us about it . . .

"Q. Were coats ever taken directly up to the upstairs storage, pending the time of repairs and cleaning?

"A. You mean, *when they were brought in, taken right up to storage?*

"Q. Yes.

"A. No." (221-225; 229).

Mrs.Bernice Stevens, appellee's saleslady since April, 1943, (232) testified:

"Q. Are you familiar with the processing of them (fur coats) *before they are put into storage?*

"A. *Yes.*

"Q. *Are coats put directly into storage?*

"A. *No.*

"Q. What is done to them?

"A. They are inspected for various things, for loose buttons, loose linings, they would be re-tanned.

"Q. Are those all things necessary, that are *necessary before they are placed in storage* upstairs?

"A. *Yes.*" (234)

Kirkevold also admitted that coats which were brought in merely for repairs and alterations, and not for storage, remained in the work room on the mazzanine floor, and were never taken upstairs to the second floor. (122, 325)

It is undisputed and not denied by Kirkevold that in his conversations with Mr. L. M. McKinley, the adjuster who later investigated this loss, Kirkevold always referred to this room as the work room and never as a storage room. (270, 271).

This policy was delivered to appellee shortly after its issuance, almost two years before the fire. He had requested and consented to the $10,000 coverage. (169, 298-300) He never made any objections thereto, and until after the fire never requested any changes therein. (300).

It is undisputed that it is always customary in insurance policies of this nature that the amount of the coverage in storage rooms, vaults, and safes, is always very much greater than the amount of insurance coverage outside of storage rooms, vaults, and safes. (317).

Neither appellant nor its local agent, Mr. Orkney, ever

had any knowledge that the value of customers' coats on the mezzanine floor ever exceeded $10,000.00. (322)

The court permitted appellee to make a vague speculative guess based on pure conjecture that of the customers' fur coats which were destroyed in the fire, 75% were situated in the west end of the work room, which the court erroneously held was a storage room, and 25% were in the east end of the work room, which the court classified as a work room; and the court made such a finding (9). (125, 126, 419). Appellee, however, admittedly spent the day of the fire out at his ranch, and was not even at the fire at all until after the fire had been extinguished. (175, 176, 186, 320). He testified:

"Q. *After the mess of the fire it was impossible to tell what coats were where,* is that correct?

"A. *Yes.* (125, 126).

On redirect examination appellee identified a photograph of some of the burned coats (Pltf. Ex. 10) and testified:

"Q. Handing you identification 10, what is that?

"A. These are coats that the firemen took out and threw on the stairs after the fire, or during the fire.

"Q. *Is that one reason why you are unable to determine what coats were where, and how many were*

in the work room, and how many were in the store room?

"A. *Yes.*" (197)

Appellee's employee, Mrs. Hazel Fiebelkorn, in response to a leading question, testified: *"I imagine"* that 20 or 25 % of the coats destroyed were in the east end of the work room. (224)

Appellee's only other employee who testified, Mrs. Bernice Stevens, admitted that she had no knowledge and could not even make a guess as to the relative percentages in each end of this room. (233)

The testimany of Mr. Sinclair and Mr. McKinley, the insurance adjusters, also conclusively establishes that after the fire things were in such a confused "mess' that even if it were material, which we deny, it was wholly impossible to make any reasonably accurate estimate as to the amount of the damaged or destroyed fur coats which were situated in the east and west ends of the work room. (251, 261, 269)

Appellee, in his conversations with the adjuster, always referred to this as the work room, rather than the storage room. (270, 271)

At the last hearing in the district court, the court, referring to this issue, said:

"If we take your general statement, they had a right

to contest the issue, which is not an open and shut issue at all.

"Mr. Velikanje. That is right." (345, 346).

It is undisputed that the practice was that when a customer brought in a coat, appellee's employees issued a receipt, and delivered the original thereof to the customer, and retained a carbon copy. The insurance policy required that this receipt in each instance show the agreed valuation of the coat, and the policy provided that appellant's liability could not exceed such valuations stated on the receipts. This was usually done, but there were numerous instances involved herein where appellee and his employees, by mistake, failed to write any valuation on the receipt issued by them and delivered to the customer. (146, 154, 236-7). This fact was unknown to appellant until after the fire. Appellee made a monthly report to appellant, which merely showed the total valuations on receipts outstanding at the end of each month. The receipts, however, were never sent to nor seen by appellant or any of its representatives. (138, 142, 183-5, 305-6, 319-20, 322).

The pre-trial order prepared by appellee's counsel and entered by the court pursuant to agreement of counsel provided:

". . . *That no claim will be higher than the valuation set forth on the receipt issued to coat owners,* except

in the case of those coats upon which there was a separate policy with the company." (38)

As to the latter the issue was reserved for decision by the courts.

Notwithstanding this clear and unequivocal provision of the pre-trial order, and the above quoted provision of the policy, the district court held that appellee could recover the full value of the destroyed coats in all instances, even though the receipts issued to the customers stated no valuation whatever. We contend that manifestly in such cases appellee cannot recover anything by reason of his failure to comply with the mandatory requirements of the insurance policy.

Appellee's minimum charge to a customer for summer storage of a fur coat was $3.50, which entitled the customer to a $200.00 valuation on the receipt. If the customer desired a larger valuation and larger insurance protection, there was an additional charge. These sums were, of course, retained by appellee, and were substantially greater than the premium rate paid by appellee to appellant. (136-7, 149).

Also, unknown to appellant, in numerous instances appellee and his employees made mistakes in issuing receipts and insurance certificates upon the same coats at different times and for different amounts. (142, 147, 237).

At the argument of the motion for new trial, appellee's counsel agreed, in open court, that the recovery on the Belair coat should not exceed $325.00, the amount stated on the Belair receipt. (342, 343). However, over our objection, judgment was erroneously entered thereon for $350.00. (403).

For the assistance of this court, we requested the court and counsel to make findings showing the amount of recovery allowed as to each coat. (385, 410, 411; also 353, 354). The court, however, refused to do so. The record includes, however, a previous draft of the findings of fact prepared by counsel for appellee, which, although not entered by the court, shows an itemized list of the amount of recovery claimed and allowed as to each coat. (402-407).

Appellee conceded that he was not claiming in any instance more than the amount he paid to the coat owner in settlement. (135, 136).

Referring to the numerous instances in which appellee made settlement with customers by replacing their destroyed coats (149) as distinguished from cash settlements, it is undisputed that appellee's rate of gross profit on fur coats was 41.78 %; in other words, his wholesale gross cost was 58.22% of the retail selling price or value. (172, 356, 359, 371, 376). Also his rate of net profits, taking into consideration all costs and expenses applicable to such replacements, was 25%. (377, 379).

As to the Mrs. J. D. Moore Russian squirrel coat, for example, appellee testified that the wholesale cost to him was $150.00, and that that was the amount he was claiming herein. (101).

Appellee's income tax return shows the relative costs in connection with his business. (Deft. ex. B-1; 172, 376). Appellee conceded, however, that as to these fur coat replacements he did not pay and was not required to pay rent to the store (which was on the agreed basis of 12½% of his sales of new coats), nor commissions to employees. (360-363, 366, 367, 373, 374).

The total of the cash settlements paid by appellee to his customers, shown by the written releases signed by them, which are exhibits herein, is $14,106.04. (Pltf. ex. 3; 68; 386).

It is also undisputed that in connection with replacements of coats destroyed some of the customers desired better coats and paid the total sum of $4,712.47 cash to appellee for that purpose. (382). The court erroneously held that appellee had a right to deduct therefrom a 20% federal luxury sales tax in the sum of $3,561.46, the difference being $1,151.01. (382). Admittedly, however, appellee did not collect any taxes from customers and did not pay any taxes with reference to these replacement transactions. (367, 370, 371). Obviously these transactions con-

stituted replacements and not sales, and hence are not legally subject to a sales tax nor a luxury tax on sales.

Appellee claims that the retail price of the coat replacements was $17,567.62. (378, 383, 384). Deducting therefrom the 25% net profit leaves $13,175.71. Deducting therefrom the amount of customers' cash payments on replacements, $4,712.47, which is admittedly included therein, leaves $8,463.24. (382).

However, it is our contention that the correct method of computation is as follows: Deducting from the $17,567.62, 41.78% gross profit leaves $10,227.87. Deducting therefrom the said customers' cash payments, $4,712.47, leaves $5,515.40. It is our contention that under the terms of the policy the latter figure represents the maximum amount of possible recovery herein as to replaced coats, aside from the over-all $10,000.00 maximum limitation.

After deducting the sum of $8,200.00 admittedly paid by appellant, (7, 184, 186, 385) the court erroneously entered findings and judgment in favor of appellee in the sum of $19,086.45 and costs; from which defendant appeals. (416-425).

SPECIFICATION OF ERRORS

The district court erred:

1. In admitting in evidence plaintiff's exhibit 4, the

the same being a purported assignment from the Utah Fire Insurance Company to appellee relative to the G. F. McGilvery coat; as no payment was made thereon by appellee, the assignment was without consideration, and no proof of execution thereof. "If there has been no payment made, we object to the assignment by her without consideration for it, and not so far as the assignment is concernd . . ." (98 and see p. 81 et seq. of typewritten record).

2. In admitting in evidence pltf. ex. 6, being certain advertising literature in the form of a mimeographed circular issued by appellee. "Objected to as immaterial, irrelevant, and incompetent, purely a self-serving declaration of the plaintiff himself, and has no probative value whatever." (127).

3. In admitting in evidence pltf. ex. 7, being a newspaper advertisement published by appellee on June 9, 1944, one month after the fire. "That is objected to as incompetent, irrelevant, and immaterial, and purely a self-serving declaration, not binding on the defendant in any way." (128).

4. In admitting in evidence pltf. ex. 8, the same being a small notebook containing a purported list of various insurance policies, alleged to have been written and delivered by Mr. James Orkney, of Hargreaves and Orkney, appellant's local agent at Yakima, the amount of this policy having been therein erroneously referred to as $100,000.00.

"That is objected to as incompetent, irrelevant, and immaterial . . . is wholly immaterial so far as proving any issue in this case is concerned, or showing anything within the authority of an agent of the insurance company . . . Since the issuance of the policy is not in dispute, I don't think that proves anything." (131).

5. In admitting in evidence pltf. ex. A-1 introduced by plaintiff at the subsequent hearing more than a month after the trial of the action, without being identified by testimony, the same being a notebook containing various figures and self-serving notations made by appellee and alleged by appellee to contain figures having a bearing upon the determination of the cost to appellee of replacements of the fur coats as to which settlements with customers were made by replacements. "Objected to as not properly identified." (388).

6. In making finding of fact No. 5, that appellee had complied with all the terms and conditions of said policy; which is erroneous for the reason that it is undisputed that he did not do so, but wrongfully issued certificates for larger amounts than the valuations shown on receipts, and at different times, and also he omitted valuations on numerous receipts issued, all of which was contrary to the terms and conditions of the policy. (409, 417).

7. In making finding of fact No. 6, and particularly finding therein that the fur garments destroyed in said

fire were of the value therein stated, to-wit, $27,415.00, and that the fire was not the result of negligence of appellee's employees. (418). In addition to other objections thereto, the same is not supported by the evidence, and the said figure should be at least $25.00 less, or $27,390.00, in view of the fact that at the argument of the motion for new trial appellee's attorney conceded that the liability on the Belair coat could not exceed $325.00 rather than $350.00. There was no proof as to the cause of the fire. Also said sum is greatly in excess of the total amount of the valuations stated on the receipts, as well as the amounts stated in appellee's proof of loss and the releases signed by customers. (Pltf. ex. 2, 3, 58-66, 68).

8. In making finding of fact No. 8, with reference to the thirteen customers who suffered loss in said fire who held special certificate policies, as the same is not supported by the evidence. (419).

9. In making finding of fact No. 9, that 75% of the customers' fur garments destroyed in the fire were situated in "a storage room" and 25% thereof were situated "outside of a storage room, vault, or safe" at said place of business, and that 75% of said loss is therefore charged against the $100,000.00 provision of the policy covering articles in storage rooms, vaults, and safes, and 25% of the loss charged against the $10,000.00 coverage of articles outside of storage rooms, vaults, and safes. (419). This finding is

erroneous for the reasons that all of said customers' fur coats destroyed or damaged in said fire were situated outside of storage rooms, vaults, and safes, and none of the same were situated in a storage room, vault, or safe. Also the said alleged segregation is not supported by substantial evidence, but is based upon pure guesswork, speculation, and conjecture. Appellee admitted that the situation was such after the fire that it was impossible for him or anyone to tell what part of the fur coats destroyed in said fire were situated in the westerly part of the work room and what part thereof were in the easterly part of the work room.

10. In making finding of fact No. 10, which is erroneous and contrary to the record in numerous respects: (a) This action was *not* instituted upon the assigned claims of customers as erroneously stated therein. The complaint makes no allegation as to assignments. Appellee's right of recovery, if any, is completely subject to all of the erroneous acts and omissions of himself and his employees. (b) That the sum of $27,415.00 referred to therein as the total value of coats destroyed is erroneous, improper, and greatly in excess of the total value of said coats destroyed, and greatly in excess of the total maximum values listed upon customers' receipts. (c) That the sum of $17,567.62 therein stated is erroneous, improper, and greatly in excess of the total retail value of said replaced coats. (d) That

the sum of $1,151.01 as the amount customers paid in cash is erroneous, improper, and insufficient. The correct amount paid by customers in cash in connection with replacement of coats destroyed was $4,712.47. Appellee contended that he had a right to deduct therefrom 20% federal luxury tax in the sum of $3,561.46, thereby arriving at the said sum of $1,151.01. However he admitted that he had paid no tax thereon. Obviously these transactions did not constitute a sale, and hence are not legally subject to a sales tax, nor a luxury tax on sales. For the same reasons it follows that the sum of $16,416.61 is not the correct figure for the net retail or replacement value. (e) This finding is also erroneous in referring to coats sold, as these were replacements and not sales; and hence not taxable as sales.

(f) This finding is also erroneous in deducting only appellee's net profit on replacements, namely 25%, rather than deducting appellee's gross profit on replacements, the same being admittedly 41.78%. In other words, as to these replacements the cost to appellee means the amount he paid at wholesale to purchase the coats. (g) The sum of $14,973.99 is erroneous, improper, and greatly in excess of the total sum paid by appellee on cash settlements to customers. It is undisputed that the total of the amounts of cash settlements paid by appellee to his customers shown by the written releases signed by them, which are exhibits

herein, is $14,106.04; or a reduction for that reason of $867.95. (Pltf. ex. 3; 68). For the foregoing reasons the final amounts stated in the last sentence of said finding, namely, $27,286.45, as the total cost of settlements, and $19,086.45 as the unpaid balance thereon, are each erroneous, improper, and grossly excessive under the evidence. (420).

11. In making conclusion of law No. 1 that appellee is entitled to recover judgment in the sum of $19,086.45 and costs, as the amount of said recovery is grossly excessive, and for the numerous reasons herein stated cannot exceed the sum of $1800.00, less our costs, the same being the unpaid balance of the maximum liability herein in the sum of $10,000.00 by reason of the fact that said destroyed fur garments were situated outside of the storage room. (421).

12. The court erred in entering judgment in favor of the plaintiff against the defendant in the sum of $19,086.45, and costs. (424).

13. The court erred in denying defendant's motion for new trial. (390-397, 415).

14. The court erred in overruling each and all of defendant's objections to plaintiff's proposed findings of fact and conclusions of law. (408-411, 416-422).

15. The court erred in making and entering judgment in favor of the plaintiff against the defendant for any sum in excess of $1800.00.

16. The court erred in finding and holding that there was any storage room, within the meaning of the insurance policy, on the mezzanine floor of the Barnes-Woodin department store where the fire damage involved herein occurred.

17. The court erred in finding and holding that by reason of said fire any liability of the defendant arose under said insurance policy in excess of the sum of $10,000.00, by reason of the limitation in the insurance policy limiting said liability to the sum of $10,000.00 as to any damage occurring outside of storage rooms, vaults, and safes. (49).

18. The court erred in finding and holding that defendant was liable as to any fur garment in excess of the agreed valuation thereof stated on the receipt issued by the plaintiff to the customer pursuant to the provision of the insurance policy involved herein. (48).

19. The court erred in finding and holding that defendant was liable to plaintiff for any fur garments as to which no valuation was stated by the plaintiff on the receipts issued by him to his customers, as required by the insurance policy. (48).

20. The court erred in finding and holding that defendant is liable to plaintiff as to any fur garments in excess of the amount stated on the receipts issued therefor in instances where insurance certificates were also issued as

to said fur garments, and especially in instances where said receipts and certificates were issued at different times and for different amounts. (46-48).

21. The court erred in finding and holding, with reference to fur garments which were replaced by the plaintiff, that the liability of the defendant is in excess of the wholesale cost to plaintiff of purchasing said replaced fur garments. (49).

22. The court erred in finding and holding with reference to said replaced fur garments that the full amount of the gross profits of the plaintiff thereon should not be deducted in determining the amount of defendant's liability to plaintiff with reference thereto. (49).

23. The court erred in finding and holding that in determining the amount of liability as to said replaced fur garments that plaintiff is entitled to credit for any federal or state luxury or sales taxes, there having been no taxable sale thereof.

24. The court erred in finding and holding that plaintiff is entitled to any recovery as to the replaced fur garments by reason of the fact that plaintiff failed to sustain his burden of proof to show with sufficient specific definiteness and certainty the amount of his actual recoverable loss thereon.

ARGUMENT

1. SUMMARY OF ARGUMENT

Our principal contentions herein may be briefly summarized as follows:

1. *The only storage room for customers' fur coats in the entire store was upstairs on the second floor. None of the coats there were damaged in any way by the fire. All of the damaged and destroyed fur coats were situated in the work room on the mezzanine floor. There was no storage room on the mezzanine floor.*

In fact this was not a separate room at all, as there was no wall separating it from the remainder of the store. But even if it were a room, it was only one room, and not two rooms. It was a single work room. The decision of the court dividing it into two separate rooms and holding that 75% of the destroyed fur coats were in one of the rooms and 25% in the other end was clearly erroneous and based on pure speculation and conjecture.

Consequently under the plain terms of the policy there cannot in any event be liability by reason of this fire for more than $10,000.00, as the loss occurred outside of the storage room. As appellant has already paid $8200.00, recovery herein cannot exceed the balance of $1800.00, less appellant's costs in both courts. Prior to the trial appellant, pursuant to Rule 68 of the Federal Rules of Civil Proced-

ure, served upon appellee an offer of judgment in said sum, which was not accepted.

This issue is in our opinion determinative of the entire case in favor of appellant; and in such event none of the other issues need be considered. Moreover this $10,000.00 maximum limitation applies to the certificates also, as they were issued *expressly subject to the terms and conditions of the master policy,* including the $10,000.00 maximum limitation.

2. The court erred in its rulings upon admissibility of evidence and in making various findings of fact and conclusions of law and entering the said judgment in favor of the plaintiff, in the respects and for the reasons hereinabove stated.

3. Also under the plain terms of the policy liability as to each coat cannot exceed the valuation, if any, stated on the receipt therefor. Consequently in those instances where appellee issued and the customer accepted receipts stating no valuation whatever, clearly there is no liability of appellant as to those coats. Also in those instances where appellee wrongfully issued certificates and receipts for different amounts, appellant's liability to appellee cannot exceed the valuations stated on the receipts, as the certificates are expressly subject to that condition clearly stated in the master policy. This is especially true where the certificates and receipts were issued at different times,

which was contrary to the requirements of the policy. The amount of recovery herein is grossly excessive and should be greatly reduced.

4. Appellant's liability in any event cannot exceed the amounts stated in the proof of loss filed by appellee nor the amounts of cash settlements paid by appellee to the coat owners.

5. Appellant's liability in any event as to the replaced coats cannot exceed appellee's cost thereof at wholesale, after deducting the entire gross profit which appellee received. Appellee in this respect failed to sustain his burden of proof as to the amount of recovery. The court erred in deducting only appellee's net profit and not his gross profit. The court also erred in permitting appellee to recover from appellant the federal luxury sales taxes, in view of the fact that these were replacements and not sales, and no such tax was paid thereon, and these transactions are not taxable.

2. ALL DAMAGED FUR COATS WERE OUTSIDE OF STORAGE ROOM—THERE WAS NO STORAGE ROOM ON MEZZANINE FLOOR—CONSEQUENTLY LIABILITY CANNOT EXCEED $10,000.00

A. THIS WAS NOT A ROOM

Before considering the principal question in the case

whether this was a storage room, we submit that this was not a room at all. It was not enclosed within four walls. There was no wall partitioning it off from the remainder of the store, especially on the east side. The fur sales room was situated on the open mezzanine floor at the top of the stairway from the street floor, and except for some show cases was not partitioned off in any manner from the remainder of the store. Likewise there was no partition between the sales room and the work room, but only show cases in which new fur coats on sale were kept. There was no door between those two rooms, but only an opening between the rows of show cases covered by a cloth drape. (It is true that there was a flimsy partition on the south side of the work room at the end of the mezzanine floor.) There was, however, no partition or wall of any nature on the east side of the work room separating it from the fur sales room and from the remainder of the main floor of the large department store. (161-2, 252-3, 269).

We submit that under these undisputed circumstances this space referred to as the work room was not even actually a separate room at all, but merely part of the more or less open space of the department store itself.

The following authorities clearly establish: (1) that *this entire space referred to as the work room actually was not a room at all, because not enclosed on all sides by walls and partitions to separate it from the remainder of*

the store; and (2) *a fortiori obviously the district court erred in holding that the west end of the work room constituted a storage room or a room at all, as admittedly there was no wall or partition of any nature separating the east and west ends of the work room.* (160, 219-20, 272-3).

Webster's New International Dictionary (1933 reference history ed.) defines "room" as follows:

> "*Space enclosed or set apart by a partition;* an apartment or chamber;—often in combination; as a bed*room;* bath*room;* the state*room* in a ship or railroad car." (All italics are ours).

In 54 C. J. 1102, the word "room" is defined as follows:

> "A familiar word, not without some considerable varieties of meaning. It has been defined as *a single inclosure, separated by partitions or other means from the other parts of a building;* a subdivision of a building, or the building itself where the structure contains but one room; *space in a building marked off or set apart by a partition;* space which has been set apart or appropriated to any purpose. In its broad sense, *any space or apartment separated from others by partitions;* and in this sense it would include a mere closet, or any small apartment thus separated. 'Room' may include a rear porch, but it has been held not to include sleeping quarters in a store, screened from the gaze of customers."

Under the rule of *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 114 A.L.R. 1487, the decisions of the Supreme Court of Washington are of course entitled to controlling effect.

Fidelity & Guarantee Fire Corp. v. Bilquist, (CCA 9) 108 F. (2d) 713, 715.

Featherstone vs. Dessert, 173 Wash. 264, 22 P. (2d) 1050, directly presented the question whether the enlarged space in the hallway near the elevator, in a hotel, admittedly in full view of the hotel patrons, constituted a room. The statute provided that a hotel, in order to exempt itself from its common law liability, must post certain notices in the public rooms thereof. The Washington court en banc held that such space does not constitute a room. The court said:

"The question then remains whether the posting of the notices on the sides of the elevator shaft constitutes a sufficient compliance with the statute. This, in turn, depends upon whether the enlarged space around and about the elevator constitutes 'a room' within the meaning of the act . . .

"In the absence of anything in the context to the contrary, words are to be taken as understood in their ordinary and popular sense . . . A 'room' as defined in Funk & Wagnall's Standard Dictionary.

'. . . is a space for occupancy or use *enclosed on all sides,* as in a building; an apartment; frequently named for the use to which it is put, as, bedroom, dining-room, engine-room, gun-room, tool-room.'

"But it is hardly necessary to resort to lexicography to determine the meaning of the word. It is one of daily use, and has a well defined signification. Whatever it may denote with reference to a building, *it is commonly and popularly applied to something other than*

a mere hallway, passageway or entrance to an elevator. Should one layman say to another, 'I will meet you in the *hall* or *hallway* by the elevator,' neither will misunderstand what is meant. Should he say, 'I will meet you in the *room* by the elevator,' it would probably provoke an inquiry for a more specific designation . . .

"Under the evidence in this case, we must hold that appellants did not post the notices in the public *rooms* of the hotel, and therefore did not comply with the statute."

Additional authorities on this point are cited in Appendix A hereto.

We therefore submit that this space on the mezzanine floor referred to by all of the witnesses as "the work room" was not actually a room at all, for the reason that it was not partitioned off from the remainder of the store, but was merely separated by a row of show cases between it and the fur sales room, and a passageway covered by a movable cloth drape without any door.

Also very clearly for the foregoing reasons and under the said authorities and others to the same effect, the district court was entirely wrong in holding that the west end of the said work room constituted a separate storage room, as admittedly there was no partition or wall of any nature across the same or between the west and east ends thereof.

B. THIS WAS NOT A STORAGE ROOM

We again quote paragraph 2 of the Furriers-Customers Custody Rider of this policy;

> "2. *This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise, nor in any event for more than the cost to repair or replace the article with materials of like kind and quality, provided always that this Company shall not be liable in any one casualty for more than the limit of liability as stated below for the location at which such casualty occurs:*
>
> *"Limits of Liability*
>
> | "In storage rooms, vaults and safes | *Outside of storage rooms, vaults and safes* | Locations |
> |---|---|---|
> | $100,000.00 | *$10,000.00* | *at 301 E. Yakima Avenue,* Yakima, Wash. |
>
> nor for more than $5000.00 while at any other location not used by the Assured for storage, nor for more than $5000.00 while in transit." (Pltf. Ex. 1; 49).

It is undisputed that there was no vault or safe for the storage of customers' furs or otherwise on the mezzanine floor. Appellee contends, however, and the district court erroneously held that the west end of the work room constituted a storage room within the meaning of the policy, and hence came within the $100,000.00 rather than the $10,000.00 limitation. Under the facts shown by the undisputed evidence hereinabove summarized and under the authorities hereinabove cited, this was clearly erroneous.

The summer storage of customers' fur coats in the extremely hot, arid Yakima district requires cooling or refrigeration devices. It is undisputed that there were no refrigeration or air cooling devices whatever on the mezzanine floor, and it was never locked and could not be locked and was at all times open to all of the employees and the general public. *The only storage froom for customers' fur coats in the entire store was situated upstairs on the second floor.* This storage room was at all times kept locked and subject to refrigeration or air-cooling machinery. (165).

It is undisputed that the only fur coats damaged by the fire were situated on the mezzanine floor. None of the fur coats in the storage room on the second floor were in any way damaged. The damaged coats were not situated in any storage room, but were in appellee's work room. (118, 164, 167, 186).

The fur coats were not stored in the work room, but were merely temporarily hung in the westerly portion of the work room for the time being until they could be reached to be worked upon and repaired before placing the same in storage on the second floor. *Admittedly no partition or wall of any kind separated the said westerly and easterly portions of the work room.* (160, 219-20, 272-3). The easterly portion of the room, and in fact most of the room, was occupied by sewing machines and work tables for repairing, fitting, and doing general work upon

customers' fur coats. (251-2, 269-71, 285). The entire room was clearly a work room and not a storage room. (251-8, 273-5, 282-5, 287-8, 291, 311). It was so designated by appellee himself. (118, 120, 124, 159-61, 167, 186, 196-7, 201, 235, 270-1).

As soon as inspection, cleaning, and repair work upon each fur coat was completed, the same was placed in storage in the storage room on the second floor. (121-4, 126, 166-7, 182, 201, 206, 220, 224-5, 228-31, 234-6, 282-3).

Appellee in two places signed the application for this insurance policy hereinabove quoted, which clearly, definitely, and unequivocally stated that there was only one storage room for customers' fur coats in the entire store, and that it was situated on the second floor and not on the mezzanine floor. (Deft. ex. A; 169-171, 187-189).

The reason for an insurance policy of this nature specifying a higher amount of coverage for fur coats in storage rooms, vaults, and safes, and a lower limitation of coverage for coats outside of storage rooms, vaults, and safes, is obvious. The coats situated in storage rooms are within definitely walled and partitioned enclosures, and customarily such storage rooms, vaults, and safes are kept locked, as was true with the storage room on the second floor in this instance. This policy, within its limits and subject to its terms, covers customers' fur coats as against damage by fire, theft, mysterious disappearance, or other-

wise. It is what is referred to as an inland marine insurance policy because of the broad range of risks covered, as in the case of marine insurance (290).

Obviously the danger of fire, theft, mysterious disappearance, or other damage, due to acts, carelessness, or omissions of employees or of the general public, is infinitely greater as to fur coats which are kept out in the open, as in this work room, than would be the case as to fur coats which are stored in storage rooms, vaults, and safes. The greater the number of people, both employees and the general public, who have access to fur coats, manifestly the greater is the danger of damage thereto, due to fire, theft, mysterious disappearance, or otherwise.

This case is a perfect illustration of this obvious fact. None of the fur coats in the storage room on the second floor were in any way damaged. The coats involved herein were damaged by a fire which started at 5:35 p. m., within five minutes after the store closing time. Although the cause of the fire has never been definitely known, it seems quite clear that the same was probably caused by a lighted cigarette carelessly dropped by someone, probably an employee, at the close of the day's work. If the fire had occurred in the middle of the night when no one was present, it would probably have been due to defective electrical wiring of some nature, but this fire occurred right at closing time in the late afternoon. Four employees worked in

the work room. No employee worked in the locked storage room and no cigarette was dropped there. (57, 175-6).

Appellee's admissions to Mr. Sinclair hereinabove quoted clearly established that he knew very well that he had only $10,000.00 insurance coverage on customers' fur coats damaged in this fire. (254-8, 262-3).

It would be, to say the least, an extremely strange, unnatural, and unreasonable construction of the language of this policy contract to say that this work room, either in its entirety, or the west end thereof, was a storage room. A storage room clearly means a room which, in the first place, is completely enclosed, partitioned, and walled in, and secondly, means a room which is dedicated and used solely and exclusively (or at least in any event, principally and primarily) for the purpose of permanent storage of customers' fur coats. This space, however, was not used for storage purposes at all, and was not even a room. This work room was used not only principally and primarily, but was actually used solely and exclusively as a work room for repairing, inspecting, cleaning, and fitting customers' fur coats. It is true that the coats were hung temporarily in this work room until they could be reached to be worked upon, *but this did not change the nature of the room nor the nature of the west part of the room, but was merely incidental to its use as a work room.* After this work was

completed, each coat was then placed in storage in the storage room on the second floor.

This distinction between *"preparation for storage"* and *"while in storage"* is expressly and definitely pointed out in the policy contract, which provides:

> while the property is in the custody or control of the Assured for alteration, repairing, cleaning, remodeling, *or preparation for storage,* or for return to customers; *and while in storage rooms, vaults, or safes* at locations hereinafter described." (Plft. Ex. 1; 47, 48).

Manifestly the intention of the parties by this language in the contract was to draw a definite distinction between "preparation for storage" and "while in storage rooms." While in the work room the coats were merely undergoing preparation for storage. When the preparation for storage was completed, they were placed in storage in the storage room upstairs on the second floor. This is the general cus-

"This policy covers during transportation or otherwise

tom of the fur business, in contemplation of which this policy was written.

This same distinction is conceded by appellee in paragraph 6 of his complaint and in the findings of fact (No. 6) proposed by him and entered by the court. (5, 418).

Aside from one or two coats which might be kept temporarily for only a few hours in the shipping or receiving room in the basement ("in transit") or at a small place for cleaning fur coats on the second floor, it is undisputed that

the only location in this entire store at 301 East Yakima Avenue, which was ever used for customers' fur coats, was this storage room on the second floor, and this work room on the mezzanine floor. If our contention is not correct—if not only the storage room but also the work room on the mezzanine floor was a storage room—then in Heaven's name why this segregation provision in the contract—why the insertion of this $10,000.00 limit of liability "outside of storage rooms, vaults, and safes?"

Appellee's brother admitted that this mezzanine space was not used as a storage room in 1943 when he became an employee. (209). Appellee admitted that there was no change in the method of handling the coats in 1942 when the policy was issued, or at any time thereafter. (206). Consequently this could not have been a storage room in 1944 when the fire occurred.

It is undisputed that in insurance of this nature the amount of coverage inside the storage room is always much more than the coverage outside of the storage room. (317).

If, as appellee contends, this work room was a storage room, then *both* of the two rooms used for customers' fur garments were storage rooms, and there was *no* space in the entire store used for customers' fur coats which was *outside* of a storage room.

It is well settled that every provision in a written contract is presumed to have some effect and to have been in-

serted for some reason and purpose.

Authorities supporting this elementary rule that a contract should be so construed as to give effect to every part thereof are cited in appendix B hereto.

Manifestly this $10,000.00 limitation provision would not have been inserted in the contract if there were no space in the store used for customers' fur garments outside of storage rooms. If, as appellee contends, both of these rooms were storage rooms, then this portion of the contract would be utter nonsense. Certainly this court cannot reach any such conclusion.

It was in a futile attempt to avoid the force of this unanswerable argument that appellee sought to divide the single work room into two rooms by placing a wall or partition across the middle of the room, which no carpenter or anyone else ever placed there prior to the imagination of counsel at the trial. As hereinabove and hereinafter pointed out, the district court fell into grievous error in accepting this argument of appellee.

The construction of the policy contract for which we contend is the only reasonable interpretation. It is well settled that language used in a contract should be given a reasonable interpretation rather than an unreasonable one.

17 C.J.S. 739, sec. 319;

City of Orlando vs. Murphy, (CCA 5) 84 F. (2d) 531, cert. denied 299 U. S. 580;

Brooks & Co. vs. N. Car. Public Service Co., (CCA 4) 37 F. (2d) 220, cert. den. 281 U. S. 741;

U. S. vs. Miller Inc., (CCA 2) 81 F. (2d) 8.

It is also well settled that, unless a contrary intent appears, "words employed in contracts are assigned their ordinary meaning."

17 C.J.S. 718, sec. 301;

New York Rapid Transit Corp. vs. New York, 303 U. S. 573, 82 L. Ed. 1024;

Day vs. Equitable Life Assur. Soc., (CCA 10) 83 F. (2d) 147, cert. denied 299 U. S. 548;

Wood vs. Employers Liability Assur. Corp., (CCA 6) 41 F. (2d) 573, 73 A.L.R. 79, cert. denied 282 U. S. 894;

S. S. Kresge Co. vs. Sears, (CCA 1) 87 F. (2d) 135, 110 A. L. R. 583, cert. denied 300 U. S. 670.

Manifestly if insurance contracts were not construed in accordance with the foregoing well settled principles and given a fair and reasonable construction, it would be necessary for insurance companies to increase substantially their premium rates, to the detriment of the public.

It is well settled that the term "storage" connotes a permanent keeping or holding of goods to await some future contingency rather than the idea of mere transiency such as the mere temporary holding of the coats in the work room to be worked upon.

60 C. J. 115, in defining the term "storage," states:

"It is said that the underlying idea of the various definitions of the word, as given by lexicographers, is that of *permanently* keeping or holding goods to await some future contingency; and that the term is not properly applied to merchandise on hand for immediate sale and disposition; and hence it may be defined as warehouse service."

In *Goodyear Tire and Rubber Co. vs. Northern Assur. Co.,* (CCA 2) 92 F. (2d) 70, a large quantity of baled crude rubber had been unloaded from a ship and left on a pier in Brooklyn, N. Y. Prior to further transportation thereof, the same was destroyed by fire. The question arose whether the same was "in storage" so as to be covered within the terms of a certain insurance policy. The court held that it was not in storage and hence was not covered by that policy. It was, however, covered by a different policy, using different language, and providing different coverage. The court held:

"Where rubber was unloaded on docks by seller, 'delivery order' given to buyer who inspected and approved it and rubber was then destroyed before it could be shipped to buyer, rubber was 'awaiting shipment' within 'inland transit floater policy' covering rubber in which buyer was interested while 'awaiting shipment' and *was not 'in storage' within coverage of import policies covering 'in storage.'*" (Syll.)

Judge Swan, speaking for the court, said:

"The defendant contends further that the rubber was excluded from the plaintiff's inland transit policy because it was within the coverage of the plaintiff's import policies. *To come within their coverage it had to*

be "in storage' in and about New York Harbor. *While lying on the pier awaiting shipment to Akron, it was not 'in storage';* it was on a pier 'awaiting shipment' and was within the express coverage of the policy sued on."

In *Monument Garage Corp. vs. Levy,* 266 N. Y. 339, 194 N. E. 848, Judge Lehman, speaking for the court, said:

"Subdivision 15 of that section prohibits the use of building or premises for storage of more than five motor vehicles. Concededly no other subdivision could be construed as a prohibition of the use of premises for a parking space. *There is a substantial distinction, clearly cognizable, between the meaning of 'storage' and 'parking.' One has a certain degree of permanency, while the other connotes transience.* The zoning ordinanc is in derogation of common-law rights to the use of private property. Its provisions should not be extended by implication. Consequently, *the prohibition of the use of a building or premises for storage of more than five motor vehicles does not include the use of premises as a place for 'parking,'* i. e., a place for the 'standing' of a vehicle, 'unattended by a person capable of operating it."

In *Atlantic Refining Co. vs. Van Valkenburg,* 265 Pa. 456, 109 Atl. 208, plaintiff maintained in Philadelphia a number of gasoline and oil "relay or distribution stations" where it kept petroleum products until the same were distributed and sold. The question arose whether these locations constituted "storage houses" within the meaning of a certain tax statute. The court held that they were not storage houses because they were not used exclusively for storage purposes, but were also used, partially at least,

for sales purposes. Judge Moschzisker, speaking for the court, said:

> "Here, on the facts at bar, it is quite clear that, no matter what other purpose plaintiff may have in view, it maintains its so-called relay stations 'for the purpose of vending goods,' and does in fact there vend certain of its merchandise, as well as the goods of others; and these facts are controlling. In brief, *plaintiff's stations are not mere storage houses,* but, to a certain extent at least, sales stores."

So here the work room was certainly used principally for repairing and fitting fur coats; and even if it were used partially or incidentally for storage purposes, which it was not, this would not render the same or any part thereof a storage room.

Additional authorities on this point are cited in appendix C hereto.

This was therefore a work room and not a storage room on the mezzanine floor. Consequently appellant's total liability by reason of this fire cannot exceed the sum of $10,000.00.

C. FINDING AS TO PERCENTAGES OF LOCATION OF DESTROYED COATS IS PURELY SPECULATIVE— PLAINTIFF FAILED TO SUSTAIN HIS BURDEN OF PROOF AS TO AMOUNT OF RECOVERY

The court clearly erred in making finding 9, that 75% of the customers' fur garments destroyed in this fire were

situated in the west end of the work room, erroneously denominated by the court a storage room, and that 25% thereof were in the east end. (419). As hereinabove stated, this contention was made by appellee and this finding made by the court because otherwise there was no answer to our contention that if *both* of these rooms were storage rooms, there was no other location in the store used for keeping customers' fur coats, and hence the contract would be absurd and unreasonable in including the $10,000.00 classification at all, as there could be no possible location in the store to which the same would be applicable.

This finding is clearly erroneous for the additional reason that the same is based upon pure guess-work, speculation, and conjecture. Appellee admittedly was engaged in operating his farm and paying little attention to the fur business. He was not even at the store until after the fire had been extinguished. The evidence clearly establishes that at that time it was physically impossible for anyone to tell with any degree of certainty what percentage of the fur coats which had been burned up and destroyed in the fire were situated in the east end and what part in the west end of the work room. (125, 126, 175, 176, 186, 197, 251, 261, 269, 320).

It is of course well settled that the burden of proof is upon the plaintiff to show with reasonable certainty the definite amount of recovery and all essential facts pertain-

ing or incidental thereto, and that a judgment, not based upon substantial evidence establishing with reasonable certainty the amount of recovery, but based only upon guess-work, speculation, and conjecture, is erroneous and must be set aside.

These rules are elementary, and authorities thereon are cited in Appendix D herein.

This burden of proof the plaintiff-appellee wholly failed to sustain. This finding is wholly unsupported by any substantial evidence, but only by pure guess-work, speculation, and conjecture. It is fundamental that a finding and judgment having such a flimsy basis cannot legally stand.

D. $10,000.00 LIMITATION ALSO APPLIES TO CERTIFICATES

This $10,000.00 maximum limitation as to appellant's liability on customers' fur garments outside of the storage room is likewise applicable to the said 13 certificates, at least while the coats were located in this store. These certificates were not separate and independent insurance policies. They were expressly subject to the terms and conditions of the master policy pursuant to which they were issued, chief among which was the foregoing provision that no liability for coats located in this store outside of the storage room could exceed the sum of $10,000.00.

Each certificate, hereinabove fully quoted, expressly provided that the same was also "This certifies that (name and address of customer) is *insured under the above designated policy" subject in all respects to the terms and conditions of said policy.*" (Referring to the said master policy). Also "This no suit or action is maintainable under the policy unless *all terms thereof* are complied with." (Pltf ex. 3; 68).

The "Furriers" Customers Certification Endorsement" attached to this master policy also expressly provides that all certificates issued thereunder shall be *"subject to all terms, conditions, and warranties of the policy and its rider to which this endorsement is attached."* (Pltf. ex. 1; 47).

In the 1945 Cumulative Supplement of Couch Cyclopedia of Insurance Law, vol. 1, note 3 under sec. 29, it is stated:

> "A certificate issued to an employee which recites that it is subject to the terms and conditions of the policy, does not constitute a complete contract of insurance between such employee and the insurer, rather, the policy and certificate must be construed together in determining liability on the certificate. *Wann v. Mertopolitan L. Ins. Co. - Tex. - ,* 41 S.W. (2d) 50, reversing (Tex. Civ. App.) 28 S. W. (2d) 196 . . .
>
> "A certificate issued to an employee which does no more than certify that a contract of life insurance exists in the form of a group policy issued by the insured to the employer is not a contract of life insurance, and to recover upon the contract of insurance, the employee must show that his loss is one defined by and coming within the provisions of the group policy. *Adair v. Gen-*

eral American L. Ins. Co., (Mo. App.) 124 S. W. (2d) 657; *Brown v. Equitable Life Assur. Soc.* (Mo. App.) 143 SW. (2d) 343; *Williams v Sun Life Assur. Co.*, (Mo. App.) 148 S.W. (2d) 112. The group insurance policy, sometimes referred to as the master policy, is ordinarily the real contract of insurance upon which the plaintiff must rely for recovery. *Watts v. Equitable Life Assur. Soc.*, ...*W. Va*..... 23 S.E. (2d) 923. The rights of the insured employee and his beneficiary are determined by the provisions of the group policy. *White v. Prudential Ins. Co.* (Mo. App.) 127 S.W. (2d) 98.

"In fact, the policy contract includes the master policy and the individual certificate. *Ozanich v. Metropolitan L. Ins. Co.*, ... Pa. Super. Ct....., 180 A. 67, rehearing denied in..... Pa. Super Ct....., 180 A. 576. Where the certificate contains no promise to pay, the insured's rights as to matters concerning payment are governed by the group policy. *Equitable L. Assur. Soc. v. Austin*, 255 Ky. 23, 72 S.W. (2d) 716."

See additional authorities on this point cited in appendix E.

Consequently since the certificates were issued expressly subject to the terms and conditions of the master policy, and the master policy very distinctly provides that the total maximum liability of appellant by reason of any fire or other loss in the said store outside of a storage room cannot exceed the total sum of $10,000.00, it necessarily follows that this limitation applies likewise to the certificates, and appellant's total liability herein cannot exceed $10,000.00, less the $8200.00 previously paid.

3. JUDGMENT BASED UPON ERRONEOUS FINDINGS, INFERENCES, AND CONCLUSIONS OF THE DISTRICT COURT MUST BE REVERSED

There is in this case relatively little conflict in the testimony as to the actual facts. There is complete disagreement as to the inferences and conclusions to be drawn from those facts.

It is of course well settled that insofar as there is a conflict in the evidence it is the duty of this court to review the evidence and to set aside the findings and reverse the case if the district court's findings of fact are *clearly erroneous or contrary to the weight of the evidence. Moreover this court is in no way bound by erroneous inferences and conclusions of the court below.*

These principles are elementary. Authorities so holding are cited in appendix F hereto.

4. INSURANCE CONTRACT MUST BE GIVEN FULL FORCE AND EFFECT

A. AMBIGUITY RULE IS NOT APPLICABLE

The rule that if an insurance policy is ambiguous, the same is construed most strongly against the company is not applicable here for the simple reason that this policy is not ambiguous. Its terms are plain, clear, unequivocal, lawful, and binding on all parties.

An insurance policy is a contract, and in construing

the same the general rules for construction of contracts apply.

It is also well settled that in the absence of statute or public policy to the contrary—and here there is none—an insurance company has the right to limit its liability and to impose restrictions and conditions thereon, and the same are binding upon all parties to the contract. *It is the duty and obligation of the courts to give full force and effect to the insurance contract made by the parties—not to make a new contract for them* and impose upon them a contractual obligation to which they never agreed, as did the district court in this case.

These principles are elementary, but authorities thereon are cited in appendix G.

B. APPELLEE IS BOUND WHETHER OR NOT HE READ THE POLICY CONTRACT

It is, of course, well settled that an assured is bound by the terms and conditions of his policy contract, and it is wholly immaterial whether or not he ever read the policy or knew its provisions.

Lumber Underwriters v. Rife, 237 U. S. 605, 59 L. Ed. 1140;

Imperial Fire Ins. Co. v. County of Coos, 151 U. S. 452, 462, 38 L. Ed. 231, 235;

Fidelity & Casualty Co. v. Fresno Flume & Irrigation Co., 161 Cal. 466, 119 Pac. 646;

Hayes v. Automobile Ins. Exchange, 126 Wash. 487, 218 Pac. 252, and 129 Wash. 202, 224 Pac. 594;
Fidelity & Guarantee Fire Corp. v. Bilquist, (CCA 9) 108 F. (2d) 713, 715;
Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297;
Moore v. State Ins. Co., 72 Iowa 414, 34 N. W. 183;
National Union Fire Ins. Co. v. Province, 148 Miss. 659, 114 So. 730;
32 C. J. 1129.

C. KNOWLEDGE OF AGENT IS IMMATERIAL

It is also well settled that knowledge on the part of an agent of the insurance company of a breach or violation of the terms of the policy or other relevant facts, which as in this case, is not communicated to the insurance company (309) is wholly immaterial, and is not even admissible in evidence against the company.

Fidelity Union Fire Ins. Co. v. Kelleher, (CCA 9) 13 F. (2d) 745;
Boston Ins. Co. v. Hudson, (CCA 9) 11 F. (2d) 962;
Lumber Underwriters v. Rife, 237 U. S. 605, 59 L. Ed. 1140.

If the court agrees with our contentions thus far in this brief, it is unnecessary to decide any of the other questions hereinafter discussed.

5. ERRORS IN ADMITTING APPELLEE'S EVIDENCE

The district court committed numerous prejudicial errors in admitting appellee's evidence over our objections. This erroneous evidence was not later disregarded, but was

partially at least the basis for the court's decision. (329-333).

For example, the court clearly erred in admitting in evidence pltf. ex. 8, the same being a small notebook containing a purported list of various insurance policies alleged to have been written and delivered to appellee by Mr. Orkney, appellant's local agent, the amount of this policy having been therein erroneously refferred to as $100,000.00. (131). This was of course the correct amount of the coverage as to coats in a certain location, namely, in the storage room at this store. Manifestly this was wholly immaterial and certainly had no legal effect in changing the terms of the contract between the parties. No local agent has any such authority, and no one ever intended that this document would have any such effect. This is clearly as inadmissible as would be testimony that Mr. Orkney, after the issuance of the policy, told appellee that he had $200,000.00 insurance on these coats. Clearly such a statement would not bind appellant nor alter the contract between the parties. *This is especially true in view of the non-waiver provision in the policy hereinabove quoted, expressly showing that no agent had any such authority.*

The court also erred in admitting pltf. ex. 6, appellee's mimeographed advertising circular, and ex. 7, his newspaper advertisement after the fire. (127, 128). These were clearly purely self-serving declarations of appellee, in-

competent, immaterial, and not binding upon appellant in any way.

Pltf. ex. 4, a purported assignment from another insurance company to appellee relative to the McGilvery coat was not properly admitted, no payment was made thereon by appellee, there was no proof of execution thereof, the same was not included within the documents as to which signatures were admitted, and the same was without consideration. In the absence of an assignment duly executed by McGilvery and duly proved, the same was purely self-serving. (98 and see p. 81 et seq. of typewritten record).

The court also erred in admitting pltf. ex. A-1 at the subsequent hearing, the same being a notebook containing various figures, which was not properly identified, not kept in the ordinary course of business, and wholly self-serving, incompetent, and immaterial. (388).

The district court seemed to feel that some of these exhibits tended to show appellee's good faith. *But appellee cannot recover upon good faith. If he recovers at all, he must recover upon the contract. He cannot lift himself by his own bootstraps.*

Appellee's advertising was, however, wholly unreliable. He admitted he advertised that he had insurance protection against moths. Actually he had none, that being excluded under the policy. (Pltf. ex. 1; 48, 177-8).

This was also a clear violation of the parol evidence rule, which is a rule of *substantive* law that the rights of the parties are to be determined entirely by their written contract. 32 C.J.S. 784, sec. 851.

Authorities establishing the inadmissability of these exhibits are cited in Appendix H.

6. LIABILITY AS TO EACH COAT CANNOT EXCEED VALUATION, IF ANY, STATED ON THE RECEIPT THEREFOR

No rights of any customer or coat owner are involved herein. Aside from the additional defendants, who were paid by other insurance companies and have defaulted, appellee has made settlements with all of them. This controversy is solely between Kirkevold and appellant.

The policy provides:

> "*This policy only covers Furs . . . for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property . . .*
>
> "2. *This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise.*" (Pltf. ex. 1; 47, 48).

In the pre-trial order it was agreed by both parties and ordered by the court:

> "*That no claim will be higher than the valuation set*

forth on the receipt issued to coat owners, except in the case of those coats upon which there was a separate policy with the company.' (38).

The issue as to the latter was reserved for decision by the courts. In numerous instances appellee and his employees violated these plain terms of the policy contract and issued and delivered to customers, who accepted, receipts which omitted to state any valuation of the coat. (Pltf. ex. 3; 68).

For a list of the names of the coat owners in this category see appendix I.

As to these garments we submit that very clearly there is no liability of appellant. Under the plain terms of the contract it was necessary for appellee to state the agreed valuation of the garment in the receipt or else there could be no recovery as to that coat.

Manifestly the customer would have no greater rights than specified in the contract. However, as above stated, here no coat owner is bringing suit, but only appellee, who was himself or through his employees guilty of the wrong in violating the terms and conditions of the policy.

In any event, of course the liability as to any of these coats could not exceed $200.00 at the most, that being the amount stated on the receipt in all instances where any amount was stated, in the absence of a request by the coat

owner for a larger valuation and the payment by her of an additional charge. (73, 74, 77).

It is undisputed that appellant and its agents had no knowledge whatever of these omissions and mistakes of appellee. (138, 142, 183-5, 305-6, 319-20, 322). The receipts were at all times retained in appellee's possession, except for the copy delivered to the coat owner. (183).

Under the numerous authorities hereinabove cited, appellee is bound by the terms and conditions of his contract, and very clearly if no valuation was stated in the receipt, appellant is not liable and appellee cannot recover as to said garments. This is especially true in view of appellee's admission in the pre-trial order. (38).

A similar situation exists as to the 13 damaged coat owners who held certificates. (137). In most of these instances appellee and his employees wrongfully and in violation of the terms of the contract issued certificates and receipts for different amounts. (142, 147, 237).

Appellee admitted that prior to the fire he knew that valuations were omitted on numerous receipts and that the amounts varied on receipts and certificates as to the same coats. (137-8). He also knew that appellant's liability was limited to the valuations stated on the receipts. (148-9). Nevertheless admittedly he did nothing to rectify the situation.

As hereinabove pointed out, the certificates were expressly subject to the terms and conditions of the master policy, including the requirement that appellant's liability should not exceed the valuation stated on the receipt.

Such agreements as to limitation of the amount of liability in the event of loss or destruction of bailed chattels are frequent and customary; and the legal validity of such agreements has been at all times recognized. 8 C.J.S. 264, sec. 26c.

Appellee also violated the terms of the policy in issuing certificates and receipts to the same coat owners at different times, as well as for different amounts. (142, 147, 237).

The "furriers' customers certification endorsement" which is part of this policy provides:

> "It is agreed by the Assured that Certifications of Insurance *shall be issued only in combination with annual storage agreements at a combined storage and insurance rate.*" (Pltf. ex. 1; 46).

Clearly the words *"in combination with"* mean that the certificates and receipts as to each garment should be issued at the same time.

Authorities so holding are cited in appendix J hereto.

All of these certificates were issued by appellee (in appellants' name). *Appellee had no authority whatever to issue certificates except in accordance with the terms and conditions of the master policy.* (141-2, 195-6). These were

admittedly mistakes made by appellee and his employees (142, 147, 237). For these mistakes appellee is responsible, but not appellant. Appellant had no knowledge whatever thereof. Copies of the receipts were never sent to nor seen by appellant or any of its agents. It was at all times contemplated that the receipts should be in the possession of only appellee and the coat owners. (138, 142, 183-5, 305-6, 319-20, 322).

Manifestly appellee cannot by his own wrongful acts, without the knowledge or consent of appellant, increase appellant's liability above the agreed valuation of the property stated on the receipt, irrespective of the issuance by appellee of certificates for larger amounts.

If no agreed valuation was stated on the receipt, as to such coats there can be no liability under the terms of the contract. And under the contract appellant's liability cannot exceed the valuation stated on the receipt as to any coat, even though appellee wrongfully issued a certificate thereon for a larger amount.

The additional premium paid by certificate holders merely entitled them to coverage of the fur coat at any location, whether within or outside of this store. The same was not independent insurance, but must comply with the terms and conditions of the master policy.

In this connection see the discussion and authorities

hereinabove cited under headings 2.D and 4.

Overruling our objections to the contrary that the same would materially assist this court in the determination of this appeal, the trial court and counsel for appellee erroneously refused to include in the findings an itemized list of the amounts recoverable as to each coat. This is shown, however, by a former draft of proposed findings prepared by counsel for appellee. (402).

For the numerous reasons herein referred to, the statement in findings No. 6 and 10 that the total value of customers' coats destroyed was $27,415.00 is erroneous, contrary to the evidence, and grossly excessive. Also said sum is greatly in excess of the total amount of the valuation stated on the receipts, as well as the amounts stated in appellee's proof of loss and the releases signed by customers. (Pltf. ex. 2,3; 58-68.

As to the Belaire coat, for example, appellee cannot recover more than $200.00, the amount claimed in the proof of loss therefor (Pltf. ex. 2: 62). The amount of her certificate was $325.00. (Pltf. ex. 3; 68). Appellee's counsel at the argument conceded that recovery thereon could not exceed $325.00. (342, 343). However, over our objection the court allowed recovery of $350.00 thereon, which was clearly erroneous. Also as to the Southard coat appellee admitted his recovery could not exceed $200.00, but actually he recovered $250.00. (155,406).

This action was *not* instituted upon the assigned claims of customers, as erroneously stated in Finding 10. The complaint (3-7) makes no allegation as to assignments. Appellee's right of recovery, if any, is completely subject to all of the erroneous acts and ommissions of himself and his employees hereinabove mentioned.

Appellee clearly cannot recover as to any coat an amount in excess of the agreed valuation thereof stated on the receipt, nor in excess of the actual value claimed therefor in appellee's proof of loss, nor in excess of the amount of the certificate, if any, on such coat, nor in excess of the cash settlement, if any, actually paid by appellee on said coat.

Consequently we have for the convenience of the court set forth in appendix *N.* hereto a list showing the maximum amount recoverable as to each coat and the basis therefor. The total is $20,531.04, of which $8200.00 has been paid. The court will bear in mind that this list is of course subject to the total $10,000.00 maximum limitation as hereinabove stated, and also subject to reduction for the cost of replacement hereinafter discussed.

7. LIABILITY CANNOT EXCEED AMOUNTS STATED IN APPELLEE'S PROOF OF LOSS NOR AMOUNTS PAID

Appellee conceded that of course he is not entitled to

and is not asking recovery in excess of the amounts paid by him on settlements to coat owners. (135, 136).

It is also well settled that appellee cannot recover herein amounts in excess of those claimed by him as the true values in his sworn proof of loss. (Pltf. ex. 2; 58-66).

McLane v. American Mutual Fire Ins. Co., 122 Iowa *355,* 98 N.W. 146;

Case v Manufacturers' Fire & Marine Ins. Co., 82 Cal. *263,* 21 Pac. 843;

Morley v. Liverpool Lnt. Ins. Co., 85 Mich. *210,* 48 N.W. 502;

Banking Savings Life Ins. Co., v. Milan, Tex. *Civ. app.,* 70 S.W. (2d) 294;

National Union Fire Ins. Co. v Provine, 148 Miss. *659,* 114 So. 730.

8. LIABILITY ON REPLACED COATS CANNOT EXCEED APPELLEE'S WHOLESALE COST

A. APPELLEE FAILED TO SUSTAIN HIS BURDEN OF PROOF AS TO AMOUNT OF RECOVERY

As to the replaced coats appellee cannot recover at all for lack of evidence. As hereinabove pointed out, under the authorities cited in subdivision 2 C hereof, the burden of proof rests upon plaintiff under the evidence both to bring himself within the terms of the contract and also to show definitely the amount of recovery to which he is entitled thereunder. Here again appellee wholly failed to

sustain his burden of proof. He failed to introduce specific evidence complying with this replacement limitation clause of the policy.

B. INSURANCE IS SOLELY FOR INDEMNITY, NOT FOR PROFIT

In any event, the amount of recovery herein is grossly excessive. Under the policy appellant's liability cannot exceed appellee's wholesale replacement cost. It is well settled that the whole underlying basis of insurance is solely for indemnity and not for profit. Notwithstanding this, appellee is here admittedly seeking to recover a profit at appellant's expense. (184-5, 256-7). This may not be done.

Authorities supporting this elementary principle are cited in appendix K hereto.

C. APPELLEE'S GROSS PROFIT, RATHER THAN NET PROFIT, SHOULD BE DEDUCTED

The policy contract provides:

> *"This company shall not be liable hereunder . . . in any event for more than the cost to repair or replace the article with materials of like kind and quality."* (Pltf. ex. 1; 49).

It is undisputed that appellee's gross profit was 41.78%; his wholesale cost was 58.22% of the retail value. (172, 356, 359, 371, 376). His rate of net progit was 25%. (377, 379). The court erred in permitting a deduction of only the net profit, as the entire gross profit should be deducted

to arrive at appellee's wholesale cost, which is clearly what was contemplated by this provision of the policy. As to these replacements the cost to appellee means the amount he paid at wholesale to purchase the coats.

In *Cooley's Briefs on Insurance* (2d ed.) vol. 6, P. 5095, it is said:

> "And where it is provided that the insurer's liability shall in no event exceed what it would cost the insured to repair or replace the property destroyed, the clause (limiting the insurer's liability to the cost to repair or replace) means, in the case of personal property, not the market value of the property, but *what it would actually cost to repair* or *replace the destroyed property.*"

Additional authorities to the same effect are cited in appendix L.

D. REPLACEMENTS ARE NOT TAXABLE AS SALES

The court also erred in Finding 10 and elsewhere in charging appellant with taxes. Appellee received $4,712.47 cash from customers in connection with coat replacements. (Additional payments to obtain better coats). (382). The court erroneously permitted appellee to deduct therefrom 20% federal luxury tax on the full retail value of all replacements in the sum of $3561.46, the difference being only$1151.01. (382). Appellee conceded, however, that he paid no tax thereon. (367, 370, 371). Manifestly these replacement transactions did not constitute sales, and hence

are not legally subject to a sales tax nor a luxury tax on sales. The court clearly erred in charging appellant therewith. Appellant is entitled to credit for the full amount of all cash payments by customers, without any tax deduction therefrom.

Clearly where there is no sale, there is no tax. The statute (26 USCA sec. 2401) provides:

> "There is hereby imposed upon the following articles *sold* at retail a tax equivalent to 20 per centum of the price for which so sold: Articles made of fur on the hide or pelt, and articles of which such fur is the component material of chief value."

The essential ingredient of every sale is the payment of the purchase price equivalent to the value of the article by the purchaser to the seller. *Here there was no payment of any purchase price. There was merely the delivery of an article in replacement of another destroyed. There was no sale, and hence no sales tax.*

Authorities supporting this well settled principle are cited in appendix M hereto.

E. FINDINGS THEREON ARE ERRONEOUS

For the foregoing numerous reasons finding 10 (420) is clearly erroneous and should be set aside.

The maximum liability on this phase of the matter is as follows:

From the retail price of the coat replacements, $17,567.62, should be deducted appellee's gross profit of 41.78%, which leaves $10,227.87, appellee's wholesale cost of the coats delivered in settlements. Deducting therefrom customers' cash payments, $4,712.47, which is included in the said $17,567.62, leaves $5515.40. The latter figure represents the maximum amount of possible recovery herein as to replaced coats.

The total cash settlements paid by appellee shown by the, written releases is $14,106.04. (Pltf. ex. 3; 68). The total of these two figures is $19,621.44. Appellee's recovery *could not in any event exceed the latter figure,* less the $8200.00 heretofore paid, or $11,421.44. (But see the next paragraph.)

9. CONCLUSION

We particularly call the court's attention to the last appendix, appendix N hereto. Subject to the $10,000.00 limitation, the second column thereof gives the total maximum liability, namely, $20,531.04, less $8200.00 paid, without considering replacements. The final column, however, makes allowance for replacements at the rate of 58.22%, the wholesale cost to appellee. The figures in both columns are the same as to cash settlements. The total figure in the final column is $17,403.02, less $8200.00 paid, or $9,203.02, which is the total maximum liability of appellant

herein, aside from the $10,000.00 limitation.

However, our contention as to the $10,000.00 limitation is sound, and we therefore submit that the judgment should be reversed with directions to enter judgment in the sum of $1800.00, less appellant's costs in both courts.

Respectfully submitted,
CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON
JOHN GAVIN
WALTER J. ROBINSON, JR.
Attorneys for Appellant

APPENDIX

ADDITIONAL AUTHORITIES

A. *Additional Authorities Referred to on Page 45.*

In *Strell vs. Zisman,* 5 N. J. Misc. 427, 136 Atl. 801, the court held that the screened-off portion of a store used by the owner for sleeping quarters, did not constitute a room. The court said:

> "The upholsterer, for his own convenience, had screened off part of the rear of the store for sleeping quarters for himself and his two sons. It was a makeshift affair and was described by witnesses as an improvised room or platform extending from the rear wall into the store, resting on two by four joists and inclosed with beaver boards to the height of six feet above the platform. This 'room,' it is claimed violated the Tenement House Act and rendered complainant's title defective and invalid, and justified the defendant's rejection of the contract. The contention is untenable . . . .
>
> "But if it be granted that the building was within the statutory definition of a tenement house, there was no violation of the section secondly above quoted. The sleeping quarters, screened from the gaze of customers in the store, did not rise to the dignity of a room. It was a mere insert in the store, a bunk, a poor man's substitute for a folding bed, and so frail that it could be taken apart in an hour. *It was not a structural change of the building* or division of the store into two rooms, and interdicted by section 28, unless the change conformed to other provisions of the act as to windows, light, and air."

Bearing in mind the rule of *Erie Railroad Co. vs. Tompkins,* supra, what is the law in New York? That is the state in which appellant is incorporated and has its principal

home office for the issuance of policies. In *Gardner vs. Roosevelt Hotel,* 24 N. Y. S. (2d) 261, the New York court approved the foregoing authorities, and also *Michaels vs. Fidelity & Casualty Co.,* 128 Mo. App. 18, 105 S. W. 783, infra. There, as here, the plaintiff checked her fur coat on the mezzanine floor and it was never returned. The checking facilities consisted of racks and tables placed in an enlarged open space in front of the elevator. The statute limited the liability of the hotel as to property deposited in a check room. The court held that this was not a room. The court said:

> "A room is defined in Funk & Wagnall's Standard Dictionary as 'a space for occupancy or use *enclosed on all sides* as in a building; an apartment; frequently named for the use to which it is put, as bed room, engine room, tool room.'
>
> "The reported cases in this jurisdiction offer little help with respect to the interpretation to be placed upon the word 'check room.' In Michaels vs. Fidelity & Casualty Co. of New York, reported in 128 Mo. App. 18, 105 S. W. 783, 784, the court stated: 'The storeroom . . . . . is a room in an apartment or flat house set apart and having conveniences such as shelves, hooks, etc., for storage purposes, and is not, for instance, a bedroom used by the tenant in part for storing his goods.'
>
> "Again in Strell v. Zisman, 136 A. 801, 802, 5 N. J. Misc. 427, the question arose as to whether the screened-off portion of a store used by the owner for sleeping quarters constituted a room. The court said: 'The sleeping quarters, screened from the gaze of customers in the store, did not rise to the dignity of a room. It was a mere insert in the store.'

"In Featherstone v. Dessert, 173 Wash. 264, 22 P. (2d) 1050, 1052, an almost analogous situation presented itself. The court in construing a statute similar to Sec. 200 of the General Business Law stated, 'But it is hardly necessary to resort to lexicography to determine the meaning of the word [Room]. It is one of daily use and has a well-defined signification. Whatever it may denote with reference to a building, it is commonly and popularly applied to something other than a mere hallway, passageway, or entrance to an elevator.'

"The court is of the opinion that the legislature in the use of the words 'check room' intended those words in their popular sense, because if it had not so intended it might have readily included and added, 'or other checking space.'

"The court held as a matter of law that the checking facilities provided by the defendants did not constitute a check room within the meaning of the statute."

In *Bentley vs. Taylor, 81* Iowa *306,* 47 N.W. 58, involving a lease using the word "room", in construing that word, the court said:

"The definitions cited show that *the word 'room' has definite meaning such as 'space in a building marked off or set aside by a partition.'* . . . . Webst. Dict."

Also directly pertinent is the law of California, the state in which appellant's Pacific coast regional office is situated. In *People vs. Chase, 117* Cal. App. 775, 1 P (2d) 60, the court said:

"The word 'room' is defined to mean *'space enclosed or set apart by a partition;* an apartment or chamber.' Webst. Dict."

In *Edwards vs. City of Los Angeles, 48* Cal. App. (2d) *62,* 119 P. (2d) 370, the court defined the word "room" as follows:

> "A room is an area set apart or appropriated for any purpose, *marked off by a partition* or line indicating its extent."

In *Crosley vs. City Council* (Ala.) 18 So. 723, 726, the court said:

> "In its broad definition, a 'room' is a space or apartment *separated from others by partitions.*"

In *State vs. Barge, 82* Minn. *256,* 84 N. W. 911, 53 L. R. A. 428, the court held that the word "room" in an ordinance was:

B. *Additional Authorities Referred to on Page 9.*

> "Used therein in its ordinary sense, as meaning *a single enclosure separated by partitions* or other means from the other parts of the building."

In *Aetna Ins. Co. v. Sacramento-Stockton S. S. Co.* (CCA 9) 273 Fed. 55, Judge Gilbert speaking for this court said:

> "It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect. Unless the rider is irreconcilable with the printed clause, such clause must stand. Merchants' Insurance Co. v Allen, 121 U. S. 69, 7 Sup. Ct. 821, 30 L. Ed. 858."

In *Lowery v. Connecticut Fire Ins. Co.* (CCA 2) 70 Fed. (2d) 324, cert. denied, 293 U. S. 576, 79 L. Ed. 674, the court said:

"This clause would be wholly futile unless it was intended to confine legal liability coverage to the named corporations. By so confining it and by limiting the words " 'for whom it may concern" ' to cargo coverage, both clauses are given a legitimate purpose and meaning. To extend the " 'for whom' " clause so as to include Lowery as well as the Hedger corporation in effect leaves out of the policy clause 36. All the terms of a contract must, if possible, be harmonized and given effect. Aetna Insurance Co. vs. Sacramento-Stockton S. S. Co., 273 F. 55, 58 (CCA 9)."

In *Rooks and Co. v. N. Car. Public Service Co.,* (CCA 4) 37 F. (2d) 220, 223, cert. denied, 281 U. S. 741, 74 L. Ed. 1154, Judge Parker speaking for the court said:

"It is not reasonable to suppose that such absurd consequences were intended; and it is elementary that, if possible, a construction of one of the provisions of an instrument is to be avoided which nullifies other provisions or leads to absurd consequences. The whole instrument must be construed together and given a reasonable construction, under which if possible, all of its provisions may stand."

In *Norwich Union Indemnity Co. v. Kobacker,* (CCA 6) 31 F. (2d) 411, 414, cert. denied, 280 U. S. 558, 74 L. Ed. 613, in reversing judgment for plaintiff in an insurance case the court said:

"We are concerned here with a written contract. Obviously " 'two" ' was inserted therein for some purpose, and would have direct relation to the issuance of a policy (acceptability of the risk) and to the hazard to be incurred by the insurer. It is the duty of the court to give effect to all parts of a written contract, if this can be done consistently with the expressed

intent of the parties. This can be done here only by construing the instant answer as an agreement on the part of the insured, as a party to the contract, to maintain two watchmen at all times while the policy is in force, and as imposing substantial performance of such agreement as a condition precedent to liability attaching."

In *Curacao Trading Co. v. Federal Ins. Co.,* 50 Fed. Supp. 441, 444, affirmed, (CCA 2) 137 Fed. (2d) 911, cert. denied, 321 U. S. 765, 88 L. Ed. 1061, in dismissing an action to recover upon an insurance policy, the court said:

"The case, therefore, comes down to this: 'Non-delivery' in the policy is a word of are or it is not. As a word of art, it does not include the plaintiff's claim but makes the contract coherent and intelligible. If it is not, its ordinary meaning will contradict the clauses providing that loss shall be paid only on proof of interest in the property insured and the language of the certificate that the defendant 'do make insurance and cause to be insured on merchandise.' The rule is that 'the court will, if possible, give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable.' Williston on Contracts, § 619; Restatement of the law, Contracts § 236 (a); *Merrill-Ruckgaber Co. v. United States,* 241 U. S. 387, 36 S. Ct. 662, 60 L. Ed. 1058; *Fleischman v. Fugerson,* 223 N. Y. 235, 119, N. E. 400."

See also to the same effect:

Woods v. Employers Liab. Assur. Corp., (CCA 7) 41 Fed. (2d) 573, 73 A. L. R. 79, 83, cert. denied, 282 U. S. 894, 75 L. Ed. 788;

Miller v. Penn. Mutual Life Ins. Co., 189 Wash. 269, 64

Hollingsworth v. Robe Lumber Co., 182 Wash. 74, 45 P. (2d) 614;

Cooley's Briefs on Insurance (2d) 999;

Restatement of Contracts, A. L. I. §236;

Williston on Contracts, Revised Ed., p. 1781, §619; *17 C.J.S.,* 711 §297, and footnote 86 of page 713;

Andrew Jergen Co. v. Woodbury, Inc., 273 Fed. 952, 959, affirmed, (CCA 3) 279 Fed. 1016, cert. denied, 260 U. S. 728, 67 L. Ed. 484.

C. *Additional Authorities Referred to on Page 57.*

In *Michaels vs. Fidelity and Casualty Co.,* 128 Mo. App. 18, 105 S. W. 783, a certain room in the basement of "a flat house" in St. Louis was kept locked and was used for the safe keeping of vegetables, other articles of food, trunks packed with winter clothes, and certain unused window curtains, as well as for laundry purposes. The wearing apparel and household goods were stolen from this room, and the question arose whether the same constituted a "store room' within the meaning of a certain burglary insurance policy. The court held that this did not constitute a store room. The court said:

> "The storeroom contemplated by clause C, we think, is a room in an apartment or flat house set apart and having conveniences such as shelves, hooks, etc., for storage purposes, and is not, for instance, a bedroom used by the tenant in part for storing his goods; nor is it a laundry used as was the one in question. If the

clause included a bedroom or laundry room in which goods are stored, then the use of any room in the apartment or flat by the tenant to store his and his family's unused apparel, although the room is used for other purposes, if it had a lock door with a key, comes within the definition of storeroom, as the term is used in clause C, and plaintiff could have only secured the protection for which he paid the premium by inducing his landlord to remove the locks from the doors of all the rooms in his apartment in which he kept trunks, or stored unused apparel and household goods."

The *Michaels* case was quoted with approval in *Gardner vs. Roosevelt Hotel,* 24 N. Y. S. (2d) 261, *supra.*

In *Town of Newberry vs. Dorrah,* 105 S. C. 28, 89 S. E. 402, the court held that temporarily placing certain liquor in the cook room in the house of the defendant's employer did not constitute storage thereof. The court said:

"There is not the slightest suggestion in the evidence that is was intended to be stored there longer than dinner time when the defendant intended to go to his own house and carry his liquor with him. . . . It was no more than if he had placed it in a wagon, buggy, or automobile and stopped to finish his work at his employer's house until dinner hour, when he would quit for dinner and carry it home. It was no more storing in the eyes of the law than if one goes to the express office, gets his liquor, lives some distance from town, stops at a store to purchase goods, leaves his package there with intent to return and get it and carry it home, and goes out to attend to business elsewhere, his bank or lawyers, etc. Even if he did open it and take a drink, it was not a violation of law, and not sufficient to establish the fact of storing. *There is quite a difference in storing an article and temporarily*

placing it in a place. To allow a conviction to stand under the evidence in this case would be to strain the law and violate the spirit of it. . . . He temporarily placed it in the cookroom of his employer, and by so doing in no manner violated the intention of the law in such cause made and provided. . . . The defendant has not even technically violated the ordinance under which he is charged. Mr. Justice Jones in Easley v. Pegg, 63 S. C. 103, 41 S. E. 18, defines what the terms 'storing' and 'keeping' in possession means, and the evidence in this case does not bring it within the terms of this definition."

In *Easley vs. Pegg,* 63 S. C. 103, 41 S. E. 18, *supra,* the court said:

"The offense of storing and keeping in possession contraband liquors *involves the idea of continuity or habit."*

In *Williams vs. Grier,* 196 Ga. 327, 26 S. 2(d) 698, 703, the court said:

"The second of these ordinances provided that no person or garage or sales place should be allowed to use the streets of the city for storing cars, either by day or night. While the petition alleged in several places that the truck was 'parked and stored,' these terms are not interchangeable, but as ordinarily used have different and inconsistent meanings. The term 'parking,' as applied to automobiles is generally understood to mean the act of permitting such vehicles to remain standing on a public highway or street when not in use, but *it also implies transcience, while the term 'storing" connotes a certain degree of permanency.* 31 Words & phrases, Perm. Ed. pp. 96-97 1943 Cumulative Pocket Par p. 23; 40 Words and Phrases, Perm. Ed. 226,227. Mere parking would not amount to storing; and this is true even though the vehicle may have been allowed to remain in the same place overnight

and during a portion of the following day . . . . Nor would a different conclusion be authorized because of the allegation that the said 'defendants had habitually, for several months prior to said collision, been parking and storing said bakery motor-truck in said place on Green Street carelessly and negligently in violation of said city ordinance of the City of Swainsboro, Georgia, as aforesaid.' This averment, when construed by the same rule, does not show that the truck was left to remain continuously in the same place for 'several months,' but its evident meaning is that the defendants had repeatedly and from time to time, by separate acts, parked the truck in said place. Even this did not show storage. It follows that the petition did not state a cause of action so far as it was based on violation of these two ordinances."

Tres Ritos Ranch Co. vc. Abbott, 44 N. M. 556, 105 P. (2d) 1070, 130 A.L.R. 963, involved the question whether certain cattle imported from Mexico into New Mexico, where they were placed in a pasture on a large ranch, which complied with the U. S. Treasury Regulation for bonded warehouses, were "stored" within the meaning of a certain tax statute. The court held that the cattle were not stored, saying:

"It is entirely illogical to contend that cattle can usually be 'stored' like ordinary commodities. *Storage connotes a certain degree of permanency and immobility,* but grazing, or similar terms that are in use to denote the manner of harboring cattle, connote transcience."

In *Re Roberto,* 167 N. Y. S. 397, 180 App. Div. 143, involved a large retail coal business at a plant covering practically a city block in Brooklyn, N. Y. The plant consisted of

three buildings or pockets containing 28 compartments for different kinds of coal, the total capacity being 12,000 tons. Coal was accumulated during the summer for the winter supply. The court held that the employer was not engaged in the business of storage of coal, that term being used in the Workmen's Compensation Law. The court said:

> "I am unable to see how this award can be sustained, unless we are prepared to hold that every merchant and country storekeeper in carrying his ordinary supply and stock of goods is engaged in the storage business. The farmer who deposits his grain in the barn until such time as in the natural and ordinary course of events he would market the same; the merchant who purchases the grain from the farmer, and temporarily deposits the same in some convenient place until opportunity presents itself to sell the same to a customer in the ordinary and natural routine of business; the miller who receives the grain and the merchant and keeps it in his mill for a day or two until the natural exigencies of his business permit him to grind it into flour; the manufacturer who buys a commodity and has it in his factory with a view to using it or transforming it into the manufactured product—are all engaged in the storage business within the meaning of group 29, if the employer in this case was so engaged. It is true that the employer was conducting a large and extensive business, but it is not the size or magnitude of the business which is controlling, but the manner in which it is conducted . . . .
>
> "Definitions are sometimes vague and unsatisfactory, and the definitions of the term 'storage,' as given by lexicographers, are not conclusive in discovering the legislative intent, but may be helpful in doing so. I think *the underlying idea of those various definitions is that of permanently keeping or holding goods* to await

some future contingency, and that the term is not properly applied to merchandise which a merchant has on hand for immediate sale and disposition."

In the companion case of *Kronberger vs. Harlem Bottle Co.,* 167 N.Y.S. 400, *181* App. Div. *900,* the employer maintained a warehouse to which were taken bottles obtained by its employees from the junk and refuse at the city dump. The bottles were washed, cleaned, sorted, and kept at the warehouse until sold. The court held that the company was *not* engaged in the storage of the bottles, on the authority of the *Roberto* case, *supra.*

In *Killian vs. Brith Sholom Congregation,* (Mo)., 154 S. W.(2d) 387, in determining whether the use of premises as a place in which monuments could be kept for sale was a "storage yard" within the prohibition of a zoning ordinance, the court stated that the underlying idea of the word "storage" is that of "holding or safekeeping goods in a warehouse or other depository to await the happening of some future event or contingency which will call for the removal of the goods. As commonly used, the term is not to be applied to goods or merchandise on hand for immediate sale or disposition, as in the case of the monuments which Berger keeps on his premises for sale and not for storage, and which he sells, as does any other retail merchant, whenever a purchaser may be found.'

In *Smith vs. O'Brien,* 94 N. Y. S. 673, involving the question whether a garage had a storage lien upon an auto-

mobile, the court said:

> "This automobile was not stored within the meaning of the lien law, being continuously or occasionally upon the road at its owner's pleasure."

29 Am. Jur. 546, sec. 704, discussing the provisions of certain insurance policies, states as follows:

> "Provisions of insurance policies that certain articles shall not be 'stored or kept' are generally considered to import the idea of warehousing or depositing for safekeeping, and are usually held not to be violated by reason of the presence of a small quantity such as is usually found on premises such as those insured, *or by the mere temporary presence of the designated articles.* Accordingly, such a provision has been held not to be violated by having a small quantity of the article on hand as a medicine for personal use, and the use of a small quantity of gasoline in a stove for cooking purposes has been held not to be within a prohibition against the keeping or storing of gasoline in the insured building. Likewise, a policy of fire insurance prohibiting the storing of hazardous articles in the premises does not prohibit keeping them for sale therein. A condition against keeping gunpowder for sale or on storage upon the premises insured does not cover the case where gunpowder is merely kept upon the premises, but neither on storage nor for sale."

In *Hanover Fire Ins. Co. vs. Eisman,* 45 Okla. 639, 146 Pac. 214, Ann Cas. 1918D, 288, the court held that gasoline was not "stored" within the meaning of the insurance policy where a small quantity thereof was kept on the premises in a closed metallic container for the purpose of occasionally cleaning the wearing apparel of the assured.

In *Rafferty vs. New Brunswick Ins. Co.,* 18 N. J. L. 480, 38 Am. Dec. 525, 528, the court held that the keeping of liquor in a boarding house did not constitute storage. The court said:

> "The liquors kept by this tenant were for the consumption of her family, or to be sold to the boarders or others. No part of the house was used as a warehouse, wherein spirituous liquors, or any other articles, were deposited for safekeeping and re-delivery in specie . . . [In Langdon vs. New York Equitable Ins. Co., 6 Wend. 623] the court not only decided that a grocery, not being prohibited, might be kept in the building, but that the keeping of oil and spirituous liquors in the store, under the circumstances disclosed in the case, was not appropriating or using the building for the purpose of storing those articles, within the meaning of the policy. They define the term 'storing' as used by parties in this case, 'a keeping for safe custody to be delivered out in the same condition, substantially as when received'; and say it only applies *when the storing or safe keeping is the sole or principal object of the deposit, and not when it is merely incidental,* and the keeping is only for the purpose of consumption."

In *O'Niel vs. Buffalo Fire Ins. Co.,* 3 N. Y. 122, the court held that there was not a storage of oil and turpentine within the terms of an insurance policy where the same was left at a house for use in painting it. The court said that in order to constitute storage:

> *"The safekeeping is the principal object of the deposit."*

See also to the same effect:

Dugan vs. Harry J. McArdle Inc., 172 N. Y. S. 27;
Walsh vs. F. W. Woolworth Co., 167 N. Y. S. 394;

Phoenix Ins. Co. vs. Taylor, 5 Minn. 492 (Gil. 393); *Williams vs. Firemen's Fund Ins. Co.,* 54 N. Y. 569, 13 Am. Rep. 620.

The recent decision of this court in *Marshall vs. World Fire and Marine Ins. Co.,* 149 F. (2d) 902, is analogous. Plaintiff delivered a valuable ring to Flato, a jeweler, for the purpose of sale through him. Defendant had issued to Flato an inland marine insurance policy referred to as a jeweler's block policy, which provided that in the event of any other insurance in the name of the assured or any third party for a less amount, this policy attaches on the difference. The store was robbed and the ring was stolen. Plaintiff held a policy from another company in the sum of $20,000.00. Plaintiff sued for $25,000.00, the value of the ring, Flato's agent, having agreed with plaintiff that he was fully covered with insurance for the ring and would be responsible for the safekeeping and return of the ring to her. This court properly held that under the terms of the defendant's policy its liability could not exceed the difference, that is, the value of the ring in excess of the other insurance, namely $5000.00. So here this court should hold that under the plain terms of this policy appellant's liability thereunder cannot exceed the sum of $10,000.00.

It is well settled that appellee is bound by the provisions of his signed application for the policy.

Paddleford vs. Fidelity and Casualty Co., (CCA 7) 100 F. (2d) 606, 611, cert. denied 306 U. S. 664;

Employers Liability Assur. Corp. vs. Wasson, (CCA 8) 75 F.(2d) 749, 756;

8 Couch, Cyclopedia of Insurance Law, 7031, sec. 2175.

D. *Additional Authorities Referred to on Page 59.*

In *Oregon Washington R & N. Co., vs. Branham,* (CCA 9) 259 F. 555, this court reversed a judgment for plaintiff and said:

> "None (proof) was produced, the case is brought within the general rule that the amount should not have been left to the conjecture of the jury . . . 'Where actual pecuniary damages are sought, some evidence must be given showing their existence and extent. If that is not done, the jury cannot indulge in an arbitrary estimate of their own.' " (Citing authorities).

In *Wappenstein vs. Schrepel,* 19 Wn.(2d) 371, 142 P. (2d)897, the court said:

> "Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of the fact can with reasonable certainty determine the amount. Where there is evidence as to injuries or loss resulting from various causes, for some of which the defendant cannot be held responsible, but no evidence of the portion of such injuries or loss for which the defendant may be liable, the proof is too uncertain to enable the jury to determine the amount of such injury or loss. *Lantz v. Moeller,* 76 Wash. 429, 136 Pac. 687, 50 L. R. A. (N.S.) 68; 25 C. J. S. 496. Damages, § 28."

In *Jones vs. Nelson,* 61 Wash. 167, 112 Pac. 88, the court said:

"Damages, in legal acceptation, mean compensation for the loss suffered or the injury sustained. The flats were built for renting. There is no evidence that there were any applications for rooms before the completion and delivery of the building. Damages will not be awarded unless they are based on something more substantial than guess, assumption, or speculation."

In *Bausch Mach. Tool Co. vs. Aluminum Co.,* (CCA 2) 79 F.(2d) 217, 227, the court said:

"The plaintiff was permitted to show by Haskell his estimate of its loss of profits during the period of which recovery was permitted. As there had never been any profits and no reasonable prospect that any would be make was shown as of 1925, his estimate was nothing but a guess based on conditions contrary to fact. It was too speculative to be admissible. Eastman Kodak Co. v. Blackmore (CCA) 277 F. 694; American Sea Green Slate Co. v. O'Halloran (CCA) 229 F. 77; Central Coal & Coke Co. v. Hartman (CCA) 111 F. 96."

In *Mission Marble Works vs. Robinson Tile and Marble Co.,* (CCA 9) 20 F.(2d) 14, this court said:

"It is well settled that proof of damages must be reasonable, definite, and certain."

In *Bigelow vs. R. K. O. Radio Pictures,* ..... U. S. ..... 90. L. Ed. 579, 585 (Adv. Op., decided February 25, 1946), Chief Justice Stone, speaking for the Supreme Court, said:

"In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guess work."

In *Armstrong vs. Town of Cosmopolis,* 32 Wash. 110,

72 Pac. 1038, the court said:

> "But while it is true that the weight of the testimony is entirely for the jury, yet *mere speculation and conjecture must not be confused with legitimate testimony.* There are many theories which might be advanced, which would be mere guessing, that would be as reasonable as the theory contended for by appellants . . . . The whims which seize and control intoxicated men and the accidents that are liable to occur to them are so manifold that it would be the merest guesswork to undertake to account for the location of the body of the deceased at the point where it was found as shown by the record in this case.
>
> "We think there was no competent testimony adduced which should have been submitted to the jury."

The *Armstrong* case was approved in *Reidhead vs. Skagit County,* 33 Wash. 174, 73 Pac. 1118, where the court said:

> "We cannot ascertain the cause of the death, or see how any jury could consistently ascertain it from the testimony produced in the superior court. A jury's verdict must be founded on evidence. It is within their province to decide as to the weight, or preponderance of testimony, under proper instructions of the court. But when there is a total failure of proof as to a material and controverted allegation, a jury has no right to speculate thereon.
>
> "The case of Armstrong v. Town of Cosmopolis, supra, is amply sustained by the decisions of other courts. In Hyer v. Janesville, 101 Wis. 371, 77 N. W. 729, which was an action to recover compensation for personal injuries, the court, in its opinion at pages 376-7, uses the following forcible language:
>
> " 'It has been said by this and other courts repeatedly,

and is the established law, that a jury cannot properly be allowed to determine disputed questions of fact from mere conjecture. There must be some direct evidence of the fact, or evidence tending to establish circumstances from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact, else the question should not go to the jury for determination at all. To allow a jury to reach a conclusion in favor of the party on whom the burden of proof rests, by merely theorizing and conjeturing, will not do. There must at least be sufficient evidence to remove the question from the realms of mere conjecture, else the trial court should pronounce the pudgment of the law on the situation by taking the case from the jury when requested so to do.'

"*Patton v. Texas & Pacific R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275; *Philadelphia & Reading R. Co. v. Schertle,* 97 Pa. St. 450.

"Misfortunes often happen through causes which cannot be ascertained. Human laws and institutions cannot correct every wrong, or afford compensation for every loss or affliction. To uphold a verdict of the jury in a civil cause when there is no evidence to justify it, is not administration of justice, but the deliberate taking of the money or property of one party and transferring it to another.

"Tested by the rules of law above stated, we reach the conclusions that the trial court erred in not granting appellant's motion for a nonsuit."

In *Stone vs. Crewdson,* 44 Wash. 691, 87 Pac. 945, the court said:

"The time between the alleged cause and the actual miscarriage—thirty-three days—was, according to the

expert testimony, greatly in excess of the ordinary time in such cases; and the answers of the physicians to questions propounded to them, which were based upon the testimony, convince us that the jury could not have determined the proximate cause of the miscarriage without entering into the realms of speculation, conjecture, and guesswork, and this they are not empowered to do."

The foregoing was quoted with approval in *Anton vs. Chicago M. & St. P. Ry. Co.,* 92 Wash. 305, 159 Pac. 115, where the court said:

"Taking the opinion of the witness for the appellant, as quoted above, at its full worth, we think it is no more than a statement of a possibility or possibly a probability, more or less remote, that the tuberculosis is a result of the injury. This is not enough. The law demands that verdicts rest upon testimony and not upon conjecture and speculation. There must be some proofs connecting the consequence with the cause relied upon. The testimony, whether direct or circumstantial, must reasonably exclude every hypothesis other than the one relied on . . . .

"Granting that a possible or even probable connection between the present condition and the negligent act was shown by the appellant, we think respondent has so far overcome the showing as to leave the subject open to speculation and conjecture rather than to right reason."

In *Oklahoma Natural Gas Corp. vs. Municipal Gas Co.,* (CCA 10) 113 F.(2d) 308, 310, the court said:

"The burden is upon Oklahoma Natural (the plaintiff to ascertain by proof the amount of damages it sustained; and having failed to establish by proof the

amount of its damages, it is entitled to nominal damages only."

In *Western Union Telegraph Co. vs. Totten,* (CCA 8) 141 Fed. 533, 537, Judge Sanborn, speaking for the court said:

> "The burden was upon the plaintiffs to prove the extent of their legal injury and to separate it from that *damnum absque injuria* for which courts and juries alike are forbidden by the law to grant relief. They failed to bear this burden . . . .The record, however, is barren of all evidence of this nature and there is no way but by conjecture by which the jury could have determined the amount which the plaintiff paid for the cars of stock or the amounts which they paid for the other items which have been mentioned, and *neither courts nor juries may lawfully transfer the property or money of one citizen to another by guess.* The ruling constitutes a fatal error and the judgment must be reversed."

In *Schultz vs. Wells Butchers' Supply Co.,* 151 Wash. 382, 275 Pac. 737, the court said:

> "We have also held to the principle that the damages for loss of anticipated profits of a business, while recoverable in any proper case, *must be shown with a reasonable degree of accuracy; the evidence must be clear and free from taint of speculation and conjecture.* See cases about cited and also St. Germian v. Bakery & Confectionery Workers' Union, 97 Wash. 282, 166 Pac. 665, L. R. A. 1917F 824, and DeHoney v. Gjarde, 134 Wash. 647, 236 Pac. 290."

See also to the same effect *Richardson vs. Owen,* 148 Wash. 583, 269 Pac. 838.

It is well settled that in insurance cases the general

rule applies that the burden of proof is on the plaintiff to prove the amount of recovery and all essential facts pertaining thereto.

In *Firemen's Fund Ins. Co. vs. Globe Navigation Co.*, (CCA 9) 236 Fed. 618, 627, involving a policy of marine insurance, this court said:

> "With respect to the claim of appellee that the schooner was a total loss: the rule is that the burden of proving a loss for a cause and to an amount for which the insurers are liable is upon the assured."

In *Soelberg vs. Western Assur. Co.*, (CCA 9) 119 Fed. 23, 31, this court affirmed a directed verdict for defendant in a suit on a marine insurance policy, and stated:

> "In order to entitle the plaintiffs to recover, it is essential for them, by competent proof, to show a loss which comes within the terms of their policy of insurance. They must bring their case within the provisions of the contract for insurance. They are bound by the lawful agreements and stipulations therein contained, and must satisfactorily prove a loss. The burden is, of course, upon them to establish their right to recover. This general principle is supported by abundant authorities." (Citing cases).

In *8 Couch on Insurance* 7266, sec 2234, it is stated:

> "In fact, establishment of the amount of loss is a condition precedent to recovery; that is, to warrant recovery on a policy, the insured must prove definitely the amount of his loss."

> "Again the fact that proofs of loss admittedly have been duly furnished does not remove the burden from the

insured of showing the loss, and the amount thereof." etc. Ibid, page 7269.

In 6 Cooley's Briefs on Insurance, (2d Ed.) 5150, it is stated:

"It is incumbent on the insured to prove the value of the property destroyed and the extent of his loss . . .
"The burden is on plaintiff to show the value of his interest in the property destroyed, and unless he does so, he can only recover nominal damages."

See also to the same effect *Fidelity Union Fire Ins. Co. v. Kelleher,* (CCA 9) 13 F.(2d) 745.

E. *Additional Authorities Referred to on Page 61.*

In *Carruth vs. Aetna Life Ins. Co.,* 157 Ga. 608, 122 S. E. 226, 230, Chief Justice Russell, speaking for the court, and reversing the judgment in a suit upon an insurance certificate, said:

"What relation does the certificate bear to the policy? It cannot be assumed but that the obligation of the certificate was in the contemplation of both of the parties to the contract of insurance. The policy refers to the certificate, and the certificate refers to the policy as the basis of its issuance. In no event is any payment to be made except to the holder of a certificate. *The policy and the certificate are interlocked like the Siamese twins.* Contemporaneous instruments, each affecting and controlling the same subject-matter, to-wit, insurance of the life of an employee of the Lanette Cotton Mills by the Aetna Life Insurance Company, the two writings may be considered as *essential, indivisable parts of one contract. United it stands, divided it falls.*"

In *Seavers vs. Metropolitan Life Ins. Co.*, 230 N. Y. S. 366, 132 Misc. Rep. 719, in dismissing an action against an insurance company, the court said:

> "The first proposal is that the certificate delivered to the insured contains the entire insurance contract, and that the failure to specify therein the manner of changing the beneficiary permitted the insured to determine how the change should be made. This contention is contrary to the statutory provision relating to group insurance and to the context of the certificate . . . .
> "The statute does not attempt to clothe the certificate with the formality of a contract of insurance. The certificate is required as evidence of the contract and to apprise the insured of his rights thereunder. The provisions of the statute bear no other interpretation. The statements in the certificate follow the direction of the statutes, and this instrument does not purport to be the contract of insurance. The company certifies that the employee is insured 'under and subject to the terms and conditions of group policy No. 468G.' The language of the certificate is plain and unmistakable. There can be no complaint of vagueness of expression or subtle avoidance of clarity.
>
> "The provision in the certificate that 'the right to change the beneficiary is reserved' is information of insured's privilege under the policy. Instructions for consummating the change are *contained in the policy, and reference to this document is necessary for such purpose.* The method prescribed is a condition of the policy, and compliance therewith is obligatory in order to substitute another beneficiary. Sangunitto v. Goldey, 88 App. Div. 78, 84 N.Y.S. 989. The direction of the insured by will was not in conformity with the direction of the policy and did not effect a change of the beneficiary."

In *Wann vs. Metropolitan Life Ins. Co.,* (Tex). 41 S. W. (2d) 50, 52, the court said:

"Under such contract the certificate issued to the plaintiff in error did not constitute the complete contract of Insurance. It merely evidenced his right to participate in the insurance provided by his employer *under the terms and conditions imposed in the group policy* when construed in connection with the certificate . . .

"Plaintiff in error's cause of action, as disclosed by his pleading, was based upon the issuance of the group policy. Obviously he was not entitled to recover by merely offering in evidence the certificate and rider attached thereto. These instruments disclose upon their face that they were not intended to and do not constitute a complete contract of insurance. Even if he had predicated his cause of action solely upon the certificate and rider, without any reference to the group policy, a recovery would not have been authorized when it was shown by the express terms of these instruments that they constituted but a part of an indivisible contract.

"It is argued that the certificate with rider attached issued to Wann was so complete in its terms that it was not essential for him to establish the provisions of the group policy. The parties to this contract expressly agreed that plaintiff in error was insured subject to the terms and conditions of the group policy. *However complete the terms of the certificate may appear to be, the fact remains that the parties agreed it should be subject to the terms and conditions of another instrument.* In the face of such an agreement plaintiff in error *had no right,* without the consent of the insurance company, *to change this contract so as to entitle him to recover without regard to the terms and conditions of the policy* expressly made a part of the contract. The terms of the certificate may have been ma-

terially modified by stipulations contained in the group policy.

"In order for plaintiff to set up a cause of action under the terms of the certificate, it was incumbent upon him to allege and prove that the provisions of the group policy, when construed in connection with the certificate and rider, entitled him to recover for the disability resulting from the injuries sustained in the service of his employer."

After quoting with approval the *Carruth* and *Seavers*

"The doctrine announced in the foregoing cases is but

cases, supra, the court concluded:

the application of the familiar rule of construction that, where an instrument refers in specific terms to another instrument in such a way as to show a clear intention to make it a part of the contract, both instruments must be introduced in evidence before a recovery can be had thereunder. Spande v. Western Life Indemnity Co., 61 Or. 220, 117 P. 973, 122 P. 38; Bradstreet v. Rich, 74 Me. 303; Casey v. Holmes, 10 Ala. 776; 13 C. J. 757.

"We do not deem it proper to pass upon the question as to whether or not plaintiff in error was shown to be totally and permanently disabled within the meaning of the language of the certificate, as upon another trial the certificate must be construed in connection with the terms and provisions of the group policy."

In *Adair vs. General American Life Ins. Co.,* (Kan. City Ct. App.) 124 S. W. (2d) 657, involving a similar situation with a group insurance policy and a certificate issued thereunder, the court said:

"A reading of the two instruments [contract and cer-

tificate] here partially quoted, discloses that the *contract of insurance,* upon which suit must be based, is made up of the following: (a) The group policy issued to the employer; (b) the application of the employer; and (c) the application of employee. The group policy and the certificate are so interdependent upon each other as to create a situation where the rights of plaintiff cannot be determined without reference to the group policy. *The conditions under which defendant is liable to plaintiff are made to depend, by reference in the certificate, on the conditions stated in the group policy.* Indeed, plaintiff's certificate could not issue except upon his *application* for a certificate *under* the group policy; and the certificate shows on its face that it was issued thereunder."

In *Watts vs. Equitable Life Assur. Soc., 125* W. Va. *209,* 23 S.E. (2d) 923, the court stated:

"We think it clear that the group insurance policy, sometimes referred to as the master policy, is, ordinarily, and in this case certainly, the real contract of insurance upon which plaintiff must rely for recovery. In Crawford and Harlan on Group Insurance, section 15, page 31, it is stated: ' . . . the master policy issued and delivered to the employer is the real contract of insurance under the group plan, or, as it is frequently said, the primary contract. This is true because it is the basis of the certificate issued to the employee. It is the foundation of the insurance provided for the employee's benefit. It contains the terms and conditions of the insurance agreement, and in practically every instance the certificate by its own provisions states that it is issued in accord with the terms and conditions of the group policy to which it refers."

In *Ozanich vs. Metropolitan Life Ins. Co., 119* Pa. *52,* 180 Atl. 67, the court said:

"The policy contract in suit includes not only *the group*

or master policy, but also the certificate of insurance issued to the employee," etc.

In *Brown vs. Equitable Life Assur. Soc.,* (St. Louis Ct. App.) 143 S.W.(2d) 343, the court said:

"The rights of the employees or his beneficiary are to be determined under the provisions of the group policy, so that in an action upon the group policy the burden is on the beneficiary to show that the deceased employee was insured under such policy at the time of his death."

In Thull vs. Equitable Life Assur. Soc., (Ohio App.) 178 N. E. 850, the court said:

"The errors complained of, in fact, all go to the matter of the contract's construction, and it may now be said that the certificate delivered by the employer to the employee is no part of the contract of insurance; but that the contract consists of the policy issued by the society to the employer and the application therefor. The employee's certificate is only a recitation of his right to protection under the terms of the contract, so long as the conditions of the policy are complied with."

In *Equitable Life Assur. Soc. vs. Austin, 255 Ky. 23,* 72 S.W.(2d) 716, the court said:

"The actual contract of insurance, from which Austin's right must be measured, was a group policy."

In *Magee vs. Equitable Life Assur. Soc., 62* N. Dak. *614,* 244 N. W. 518, 85 A. L. R. 1457, the court said:

"The certificate issued to John Magee states he was 'insured for the sum of five hundred dollars with the Equitable Life Assurance Society of the United States

if death occur while in the employment of said employer and during the continuance of said policy.' The certificate expressly states, however, that this is 'subject to the terms and conditions of Group Life Insurance Policy No. 5,448,244.' . . .

"So far as John Magee was concerned, the employer canceled the insurance, without notice, unless he was discharged, and discharge would be notice. This action of the employer absolved the defendant from obligation. . . .

"So far as the defendant is concerned, the rights of the parties were fixed by the contract made with the employer. (Citing cases)

"The contract known as group policy No. 5,448,244 precludes liability thereunder, unless the name of the employee is certified to the assurance society, is not cancelled, and premiums are paid for him monthly. This nonliability here does not arise because the deceased was not in the employ of the company; but because the requirements of the insurance policy were not fulfilled for and on behalf of the deceased. His name was removed and no further premiums paid for him; hence the defendant is not liable on this certificate.

"It is said the defendant failed to notify John Magee that his name was no longer certified and that no further premiums were paid for him. The defendant was not obligated to do so."

See also the numerous authorities to the same effect cited in the Magee case.

F. *Additional Authorities Referred to on Page 62.*

In *State Farm Mutual Automobile Ins. Co. vs. Bonacci,* (CCA 8) 111 F.(2d) 412, in reversing judgment and hold-

ing that there was no liability upon an insurance policy, the court said:

> "The rule plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings. If this were not true, the provision that requests for findings are not necessary 'for the purpose of review' would be meaningless. If the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses. In Simkins Federal Practice, 3rd Ed., page 488, in commenting on the effect of Rule 52 (a), it is said:
>
> " 'The new practice, now incorporated in the Civil Procedure Rules, accords with the decisions on the scope of the review in modern Federal equity practice, and applies to all cases tried without a jury, whether legal or equitable in character, and whether the finding is U. S. 428, 43 S. Ct. 445, 449, 67 L. Ed. 731, the Supreme ing or of a fact inferred from uncontradicted testimony.
>
> " 'Under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the special qualification of the trial judge to pass on credibility.'
>
> "The rule with reference to review of findings of fact in equity cases has often been announced by this court. (citing cases)
>
> "In Koenig vs. Oswald, supra, (82 F.(2d) 85), we reversed the findings of the lower court in a fraud case because they were deemed to be contrary to the weight of the evidence, even though they were sustained by the spoken word from the witness stand. While the findings of fact are presumptively correct, they are

not conclusive on appeal, if against the clear weight of the evidence. In Keller v. Potomac Electric Co., 261 of a fact concerning which the testimony was conflict-Court, in discussing procedure in an equity case, said: 'In that procedure, an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses."

In *Fleming vs. Palmer,* (CCA 1) 123 F.(2d) 749, 751, cer. denied, 316 U. S. 662, the court said:

"A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence. Aetna Life Ins. Co. v. Kepler, 8 Cir. 1941, 116 F.(2d) 1; State Farm Mutual Automobile Ins. Co. v. Bonacci, 8 Cir., 1940, 111 F.(2d) 412; Manning v. Gagne, 1 Cir., 1939, 108 F.(2d) 718; Fed. Rules of Civil Procedure and The American Bar Institute Proceedings, p. 316 et seq. (Cleveland, 1938); Clark & Stone, Review of Findings of Fact, 4 U. of Chi. L. Rev. 190 (1937)."

In *United States vs. Anderson,* (CCA 7) 108 F.(2d) 475, 478, in reversing judgment for plaintiff, the court said:

"The problem is one of construction, one of application of the taxing statute. In such situations, the findings of the trial court, while worthy of great consideration, are not conclusive, cf. Federal Rule 52 (a), Federal Rules of Civil Procedure, 28 U.S.C.A. following Section of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court. Bogardus v. Commissioner, 302 U. S. 34, 39, 58 S Ct. 61, 82 L. Ed. 32."

In *MacGowan vs. Barber,* (CCA 2) 127 F.(2d) 458, 461, in reversing and dismissing the action, the court said:

> "Though findings of fact by a trial judge are entitled to be given great weight on appeal from a decree in equity, such appeals involve a review of the facts as well as of the law. Virginia Railway Co. v. United States, 272 U. S. 658, 675, 47 S. Ct. 222, 71 L. Ed. 463; La Abra Silver Mining Co. v. United States, 175 U. S. 423, 464, 465, 20 S. Ct. 168, 44 L. Ed. 223; Standard Accident Insurance Co. v. Simpson, 4 Cir., 64 F.(2d) 583, certiorari denied sub nom. Carolina Contracting Co. v. Standard Accident Insurance Co., 290 U. S. 688, 54 S. Ct. 123, 78 L. Ed. 593."

In *O'Brien, Manual of Federal Appellate Procedure* (1941 ed.), at p. 20, the learned author states:

> "Where finding of fact are contraary to the weight of the evidence, even though they were sustained by the spoken word from the witness stand, the Appellate Court has power to reverse the judgment based thereon; while the findings of fact are presumptively correct, they are not conclusive on appeal if against the clear weight of the evidence."

In *Gage vs. General Casualty Co.,* (CCA 9) 120 F.(2d) 925, 929, this court held that there could be no recovery against the defendant insurance company, that under the said Rule 52 (a) this court has a "broad power of review" of the district court's findings of fact, and that said findings should be reversed if clearly erroneous.

In *Equitable Life Assur. Soc. vs. Irelan* (CCA 9) 123 F.(2d) 462, this court reversed and dismissed an action to recover on an insurance policy and held that the findings

of fact made by the trial court were contrary to the evidence and should be set aside.

In *U. S. vs. Still,* (CCA 4) 120 F.(2d) 876, 880, the court reversed judgment for plaintiff in an action on a war risk insurance policy and held the findings of fact made by the trial court were clearly erroneous and should be set aside.

> "An appellate court . . . will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury." *U. S. vs. Aluminum Co.,* (CCA 2) 148 F.(2d) 416, 433, per Judge Learned Hand.

> "It has often been held . . . that an upper federal court may regard the findings of a trial court as clearly erroneous because patently against the weight of the testimony." (citing numerous cases)

Schultz vs. Manufacturers and Traders Trust Co.. (CCA 2) 128 F.(2d) 889, 900.

> "Since the facts are not in dispute, we are free to consider them and to reach our own conclusion, untrammelled by the district court's findings and conclusions of law."

Wigginton vs. Order of United Commercial Travelers, (CCA 7) 126 F.(2d) 659, 661, an insurance case.

To the same effect in *U. S. vs. Mitchell,* (CCA 8) 104 F.(2d) 343.

> "Of course Federal Rule 52 does not require us to accept fact findings unsupported by the evidence. *Nor does this Rule require us to respect conclusions of law which do not rest properly on the facts so found. It is cer-*

tain that the principle giving the above described weight to the trial court's findings of fact, does not compel the reviewing court to give any specific weight to the trial court's conclusions of law, as it yet remains the duty of the appellate court to decide whether the correct rule of law has been applied to the facts found. Whether special findings are supported by the evidence or whether they give the requisite support to conclusions rendered thereon, are questions open to consideration here."

Campana Corporation vs. Harrison, (CCA 7) 114 F. (2d) 400, 405.

"*The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings.* And so, while accepting the facts competently found by the trial court as correct, *an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce.* Such was the law prior to the promulgation of the Rules of Civil Procedure. *Brown v. United States,* 3 Cir., 95 F. (2d) 487, 490; *Dunn v. Trefry,* 1 Cir., 260 F. 147, 148. The new rules have worked no change in this regard, or with respect to the ultimate conclusions in jury-waived cases in particular. *Cf. Aetna Life Insurance Co. v. Kepler,* 8 Cir., 116 F. (2d) 1, 5. See also 3 Moore, Federal Practice, p. 3115, et seq., and notes of the Advisory Committee on Rule 52 (a). The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate fact remains appropriate matter for an appellate court's consideration. *State Farm Mutual Automobile Insurance Co. v. Bonacci et al,* 8 Cir., 111 F. (2d) 412, 415. Where the evidentiary facts are not in conflict or dispute, *the conclusions to be drawn therefrom are for the appellate court* upon review of the trial court's action. *Cf. United States vs. South Georgia Railway Co.,* 5 Cir., 107 F. (2d) 3, and

United States v. Mitchell, 8 Cir., 104 F. (2d) 343, 346. *An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52 (a) specifically provides."*

Kuhn vs. Princess Lida, (CCA 3) 119 F. (2d) 704.

G. *Additional Authorities Referred to on Page 63.*

Bearing in mind the rule of *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64, *supra,* these elementary principles have been repeatedly applied in Washington.

In *Isaacson Iron Works vs. Ocean Accident and Guarantee* Corp., 191 Wash. 221, 70 P.(2d) 1026, the court said:

"Appellant is, of course, entitled to stand upon its contract as written, and *the insured must bring himself within the terms of the policy before he can establish the insurer's liability thereon. Imperial Fire Ins. Co. v. Coos County,* 151 U. S. 452, Couch Cyc. of Insurance Law, vol. I, § 57; 14 R.C.L., § 103, p. 926 . . .

"The parties to a contract of insurance may contract for any lawful coverage, and they are free to enter into any contract they desire. In the case of *Cosgrove v. National Casualty Co.,* 117 Wash. 211, 31 P. (2) 80, this court said:

" 'In the absence of some statutory provisions to the contrary, an insurance company has the right to limit its liability, and to impose restrictions and conditions upon its contractual obligation, not inconsistent with public policy.'

"This doctrine is well stated in the text of Couch, Cyc. of Insurance Law, vol. I, § 57, as follows:

" 'It is axiamatic that *parties may make such a contract*

for insurance as they may see fit, provided the same does not contravene any provision of law or public policy, and this, even though the contract is improvident as to the insured.'

"This court has laid down the rule that, in construing policies of insurance, the general rules for construction of contracts apply. In the case of *Richards v. Metropolitan Life Ins. Co.,* 184 Wash. 595, 55 P. (2d) 1067, we said:

" '*A policy of insurance is a contract,* and its language, like that of any other contract, must be given its usual and ordinary meaning, unless it is apparent from a reading of the whole instrument that a different or special meaning was intended, or is necessary in order to avoid an absurd or unreasonable result.'

"In the earlier case of *Green v. National Casualty Co.,* 87 Wash. 237, 151 Pac. 509, it was held that:

" 'Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain and ordinary meaning.' "

In *Godwin v. Northwestern Mutual Life Insurance Co.,* 196 Wash. 391, 83 P. (2d) 231, the court said:

"This court has held, in conformity with the general rule, that insurance contracts are to be construed in accordance with the general rules applicable to other contracts. In the case of *Green v. National Casualty Co.,* 87 Wash. 237, 151 Pac. 509, we said:

" 'In thus construing the policy, we are not unmindful of the rule that policies of insurance are construed in favor of the insured and most strongly against the in-

surance companies. *Starr v. Aetna Life Ins. Co.,* 41 Wash. 199, 82 Pac. 113, 4 L.R.A. (N.S.) 636. But this rule should not be permitted to have the effect to make a plain agreement ambiguous and then interpret it in favor of the insured. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain and ordinary meaning."

In *Fidelity Union Fire Ins. Co. vs. Kelleher,* (CCA 9) 13 F. (2d) 745, this court said:

"Following the steadily adhered to decisions of the Supreme Court, it is seen that the present case is directly within the well settled rule of the federal courts, that the terms of the policy are the measure of the liability of the insurer, and that, to recover, the insured must prove that he is within those terms."

In the *Kelleher* case this court quoted with approval the leading case of *Imperial Fire Ins. Co. vs. County of Coos,* 151 U. S. 452, 38 L. Ed. 231, as follows:

"If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. *The terms of the policy constitute the measure of the insurer's liability,* and in order to recover, the assured must show himself within those terms . . . The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery . . . It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. *The*

courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

See also to the same effect:

Massachusetts Bonding & Ins. Co. vs. Santee, (CCA 9) 62 F. (2d) 724;
Funk vs. Aetna Life Ins. Co., (CCA 9) 95 F. (2d) 38;
Associated Indemnity Corp. v. Wachsmith, 2 Wn. (2d) 679, 99 P. (2d) 420, 127 A.L.R. 531;
Black Masonry and Contracting Co. v. National Surety Co., 61 Wash. 471, 112 Pac. 517;
Trinity Universal Ins. Co. v. Willrich, 13 Wn. (2d) 263, 124 P. (2d) 950, 142 A.L.R. 1;
Miller v. Penn. Mutual Life Ins. Co., 189 Wash. 269, 64 P. (2d) 1050;
Kearns v. Penn. Mutual Life Ins. Co., 178 Wash. 235, 34 P. (2d) 888;
Richards v. Metropolitan Life Ins. Co., 184 Wash. 595, 55 P. (2d) 1067.
Roller v. Hartford Acc. and Indem. Co., 124 Wash., Dec. 456, 67 P. (2d).

H. *Additional Authorities Referred to on Page 67.*

In *Aetna Ins. Co. v. Sacramento-Stockton S.S. Co.,* (CCA 9) 273 Fed. 55, 59, Judge Gilbert speaking for this court said:

"Nor was it error to exclude testimony offered to show that, in applying for insurance, the plaintiff's agent agreed with the agent of the Union Marine Insurance Company that the only risks intended to be insured against were fire and collision. If the contract failed to express the intention of the contracting parties, the remedy was by a suit to reform the policy. *Insurance Co. v. Mowry,* 96 U. S. 544, 547, 24 L. Ed. 674."

In *Eddy v. National Union Indem. Co.*, (CCA 9) 80 F. (2d) 284, affirming your former opinion in 78 F. (2d) 545, this court said:

> "An oral waiver with full knowledge is not capable of proof by parol evidence where the policy is in writing, and particularly where the policy expressly provides that such a wavier must be in writing, as in the case at bar."

In *Leithauser v. Hartford Fire Ins. Co.* (CCA 6) 78 F. (2d) 320, cert. denied, 296 U. S. 645, 80 L. Ed. 459, the court said:

> "Appellant's suit was brought upon the contract of insurance delivered to him, and he cannot incorporate into it by parol a series of unrelated documents to effect a change in its terms. *Lumber Underwriters v. Rife, supra,* 237 U. S. 605, page 609, 35 S. Ct. 717, 59 L. Ed. 1140."

In *Christian v. St. Paul Fire & Marine Ins. Co.*, (CCA 5) 5 F. (2d) 489, in dismissing an action upon an insurance policy, the court said:

> "The policy in suit provides that defendant's agent should not have the power to waive any of its terms unless the waiver be written upon or attached thereto. That provision is binding upon the assured. Whatever may be the rule in other jurisdictions, the Supreme Court of the United States is firmly committed to the view that, where a policy of insurance requires that a waiver by the insurer's agent be in writing, it is not permissible to show a waiver by parol agreement or course of dealing with its agent. *Northern Assurance Co. v. Grand View Building Association,* 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213; *Penman v. St. Paul Insurance Co.,* 216 U. S. 311, 30 S. Ct. 312, 54 L. Ed. 493."

See also to the same effect:

Northwestern National Ins. Co. v. McFarlane, (CCA 9) 50 F. (2d) 539;
Kentucky Vermilion M. & Co. vs. Norwich Union Fire Ins. Co., (CCA 9) 146 Fed. 695, 698—701;
Fidelity-Phenix Fire Ins. Co. v. Queen City Bus & Transfer Co., (CCA 4) 3 F. (2d) 784, 786;
Lighting Fixtures Supply Co. v. Fidelity Union Fire Ins. Co., (CCA 5) 55 F. (2d) 110, 113, cert. denied, 286 U. S. 558, 76 L. Ed. 1292;
Trans-Atlantic Shipping Co. v. St. Paul Fire & Marine Ins. Co., 9 Fed. (2d) 720, 722—724;
Sebald v. U. S., (CCA 7) 73 Fed. (2d) 860, 295 U. S. 736, 79 L. Ed. 1684;
Northern Assur. Co. v. Grand View Building Assoc., 183 U. S. 308, 46 L. Ed. 213, and 203 U. S. 106, 51 L. Ed. 109;
Penman v. St. Paul Fire & Marine Ins. Co., 216 U. S. 311, 54 L. Ed. 493, 498;
Lumber Underwriters v. Rife, 237 U. S. 605, 59 L. Ed. 1140;
32 C. J. S., 828, 829, § 908;
Couch, Cyclopedia of Insurance Law, Vol. 8, § 2182, 7052- 7058;
Newsom v. New York Life Ins. Co., (CCA 6) 60 F. (2d) 241;
New York Life Ins. Co. v. McCreary, (CCA 8) 60 F. (2d) 355;
Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 58 L. Ed. 356;

I. LIST OF COAT OWNERS WHOSE RECEIPTS STATED NO VALUATION

referred to on page 68

Albrecht, Mrs. Earnest
Bair, Mrs. Howard
Balke, Mrs. Emma

Baur, Hattie
Beauchene, Mrs. A. J.
Carman, Mrs. Rex
Cast, Mrs. Harold
Clements, James
Hagne, Harold J.
Harnden, W. G.
Logozzo, Elsie
Metzger, Bee
Moore, J. D.
Morrill, Florence
Munsil, L. W.
Odell, Harry
Orth, J. E.
Reich, Mrs. Wm.
Stuart, Agnes M.
Souther, Frank
Thomas, Elsie
Tilton, Mrs. Rex
Verd, Mrs. Charles
Vivian, James
Wait, Carlyle

J. *Additional Authorities Referred to on Page 70.*

31 C. J. 360 and *42 C. J. S.* 476, define the term "in conjunction with" as "*combined with;* in association with; united with".

"Conjunction" is defined by Webster's New International Dictionary as follows:

> "1. Act of conjoining, or state of being conjoined; union; association; combination . . . 3. *Occurrence together; concurrent or combination, as of events.* 4. An instance of conjunction; a conjoined or associated group; a combination; union; association."

Blaisdell v. Inhabitants of Town of York, 110 Me. 500,

87 Atl. 361, 370;
Danzinger v. Cooley, 248 U. S. 319, 63 L. Ed. 266.

K. *Additional Authorities Referred to on Page 75.*

It is elementary that insurance is solely for indemnity and not for profit.

In *Lighting Fixtures Supply Co. v. Fidelity Union Fire Ins. Co.* (CCA 5) 55 F. (2d) 110, cert. denied, 286 U. S. 558, 76 L. Ed. 1292, the court said:

> "The policy was an open one. It is a fundamental principle that such a policy of insurance is a contract of personal indemity. The property is not insured against destruction, but the insured was guaranteed against loss, to the extent of his insurable interest, not exceeding the amount stipulated. As the betterments and improvements installed in the building passed to the owner at the expiration of the lease, in part consideration for the rent, appellant could not sell them, or remove them, or recover their value."

In *St. Paul Fire & Marine Ins. Co. v. Scheuer,* (CCA 5) 298 Fed. 257, in reversing judgment against an insurance company, the court said:

> "The plaintiffs may recover the amount of their actual loss, not exceeding the maximum amount of defendant's liability under the policies; for the insurance policies are only contracts of indemnity. *Imperial Fire Insurance Co. v. Coos County,* 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231. The adjuster's agreement cannot by any possibility be construed to mean that the insurance company would pay to those having an insurable interest less than the whole interest more than the loss they actually sustained."

In *U. S. v. Supplee-Biddle Hardware Co.*, 265 U. S. 189, 195, 68 L. Ed. 970, 44 S. Ct. 546, Chief Justice Taft speaking for the court said:

> "Life insurance in such a case is like that of fire and marine insurance, —a contract of indemnity. *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. Ed. 370, 9 Sup. Ct. Rep. 41."

In *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 462, 38 L. Ed. 231, the Supreme Court said:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfilment of these terms."

In *Phoenix Mutual Life Ins. Co. v. Bailey*, 80 U. S., 13 Wall. 616, 20 L. Ed. 501, the Supreme Court said:

> "Marine and fire policies are contracts of indemnity, by which the claim of the insured is commensuratious with the damages he sustained by the loss of or injury to the property insured."

See also to the same effect:

Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 503, 10 L. Ed. 1044;

Couch Cyclopedia of Insurance Law, vol. 1, p. 10, sec. 3, and p. 407, sec. 188a;

Cooley's Briefs on Insurance, (2d ed.) vol. 1, p. 120, 121, and cases cited;

44 C. J. S. 477, sec. 14;
45 C. J. S. 1010, sec. 915;
26 C. J. 17, sec. 1;
32 C. J. 975, sec. 1;

L. *Additional Authorities Referred to on Page 76.*

In *Standard Sewing Machine Co. v. Royal Ins. Co.*, 201 Pa. 645, 51 Atl. 354, the court reversed the judgment because of excessive recovery in this respect and held that under a similar policy the plaintiff, who was a manufacturer, could recover only the cost to him of manufacturing the property destroyed. The court said:

> "The first paragraph of the policy provides as follows: 'This company shall not be liable beyond the actual cash value of the property at the time any loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.' It is evident that in his ruling as to the measure of damages the learned trial judge did not properly construe this provision of the contract between the parties. The plaintiff was the "insured" and was the manufacturer of these machines. Under the clause of the policy just quoted, the loss could 'in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.' The court failed to give due weight to this provision of the policy. The actual cash value of the property at the time of the fire was the measure of damages, but it could not exceed what it would cost the insured to replace it. This would exclude the market value of the property as a measure of damages, and would permit the plaintiff to recover only what it would cost him, the insured, who was the manufacturer, to replace it. The language of the policy is plain and unambiguous, and the court should have interpreted it, and given the

jury the measure of damages suggested."

The above case is directly in point and conclusive.

In *Chippewa Lumber Co. v. Phoenix Ins. Co.*, 80 Mich. 116, 44 N.W. 1055, the court reversed a judgment for plaintiff upon a similar policy. The plaintiff confined his evidence on damage to the market value of the lumber destroyed, and the defendant introduced no evidence of value. The court said:

> "The measure of damages fixed by the parties in their contract was not to exceed the actual cost of producing the lumber destroyed. This was not the market or cash value. The court, therefore, adopted a standard of value in direct conflict with the agreement of the parties. On this point there can be no room for doubt. There is no difficulty in making the computation. If plaintiff bought the logs, the measure of damages would be the price paid, with interest from date of purchase, and cost of manufacturing and storing. If it purchased the stumpage, the measure would be the price of the stumpage, with interest, and the other costs added. If it owned the land from which the logs were cut, the measure would be the fair value of the stumpage, with the other costs added, and interest."

In *Butler v. Security Ins. Co.*, 244 Ill. App. 379, involving a similar insurance policy, in reversing a judgment for plaintiff for the full retail value, the court said:

> "This was error. The policy provided that the loss in no event should exceed the cost to the insured to replace the same with material of like kind and equal quality. This in no event could exceed the wholesale or manufacturer's price, plus transportation and handling."

In *Home Insurance Co. v. Tumlin, 241 Ala. 356,* 2 So. (2d) 435, involving a similar provision in an automobile collision insurance policy issued by this same company, the court said:

> "Where a policy of insurance provides that the insurer's liability for loss or damage to the property insured shall not exceed 'what it would cost to repair or replace the automobile or parts thereof with others of like kind and quality', the insured is entitled to recover only the cost of such repairs or replacements. Such a provision would be construed as a limitation of the insurer's liability and the test or measure of damage which insured is entitled to recover. Spivy-Johnson Portrait Co. v. Belt Automobile Indem. Assoc., 210 Ala. 681, 99 So. 80."

In *Richards v. Bussell,* 70 Wash. 554, *127* Pac. *198,* 129 Pac. 90, the court said:

> "Now these contracts do not pretend to state the cost of the work, but only the limit of cost which must not be exceeded. *The word 'cost' as used in this section preceeding the proviso, as we have seen, manifestly means cost to the contractor aside from any profit to him.*"

In *Washington Machinery & Supply Co. v. Zucker,* 19 Wn. (2d) 377, 143 P. (2d) 294, the court said:

> "In the contract before us, it was provided '. . . . We each agree to pay to you an amount equal to the percentage of the total unpaid cost of the oven and equipment as set opposite our names; . . . .' It is our opinion that, in using the word 'cost' all parties meant and contemplated the *actual* cost of manufacturing the oven and procuring the equipment not handled by respondent."

In *The Spica,* (CCA 2) 289 Fed. 436, 445, the court

said:

> "The meaning of costs is too clear for exposition; it means actual proved cost to contractor."

In *Globe & Rutger Ins. Co. v. Prairie Oil & Gas Co.,* (CCA 2) 248 Fed. 452, 457, the court said:

> "The actual cash value of the oil at the time of the fire was to be the measure of damages, *but it could not exceed what it would cost the insured to replace it.*"

In *Columbia Ins. Co. v. People's Exchange Bank,* (CCA 8) 109 F. (2d) 530, 531, the court said:

> *"The obligation of the insurance company was to pay what it would cost the insured."*

In *Insurance Policy Annotations* (1941) published by the Section of Insurance Law of the American Bar Association, Vol 1, p. 173, it is said:

> "Although the cases hold that the basis of recovery is 'the current market value' at the time of loss or damage, 'market value' has been construed to mean the market used in purchasing the goods and not the market in which the goods are sold. For instance, in cases which involve the loss of goods in the hands of dealers, it is almost unanimously held that 'cash value' means replacement cost and not selling price.

(Idaho) Boise Ass'n. of Credit Men v. U.S. Fire Ins. Co., 44 Idaho 249, 256 Pac. 523 (1927).

(Md.) Mutual Fire Ins. Co. v. Owen, 148 Md. 257, 129 Atl. 214 (1925)

(N.C.) Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S.E. 236."

See also to the same effect:

International Railway Co. v. Public Service Commission, 36 N. Y. Supp. (2d) 125, 134;
Great American Indemnity Co., v. Flour City Ornamental Iron Co., 48 Fed. Supp. 999;
McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N. E. 902, 904, 56 A.L.R. 1149;
Svea Fire & Life Ins. Co. v. State Savings & Loan Asso., (CCA 8) 19 F. (2d) 134, 136; also holding that *the burden of proof is on the plaintiff to show the cost of replacement of the property destroyed.*

This language of the policy is taken from the New York Standard form of fire insurance policy. The Washington statute (Rem.Rev.Stat. of Wash. sec. 7152) provides:

"On and after January 1, 1912 no fire insurance company shall issue any fire insurance policy covering on property or interest therein other than on form known as the New York Standard as now or may be hereafter constituted, except as follows"; etc.

The exceptions stated are not applicable here.

See *Richardson v. Superior Fire Ins Co.,* 192 Wash. 553, 74 P. (2d) 192.

As held by this court in *Funk v. Aetna Life Ins. Co.,* (CCA 9) 95 F. (2d) 38, language in an insurance policy based on a statute, even if ambiguous, is not to be construed against the insurance company.

M. *Additional Authorities Referred to on Page 77.*

It is well settled that replacements of destroyed chattels do not constitute sales.

In *Helvering v. William Flaccus Oak Leather Co.,* 313 U. S. 247, 85 L.(2d) 13, the Supreme Court said:

"Thus, the single question is whether the amount respondent received from the insurance company derived from the 'sale or exchange' of a capital asset.

"Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words 'sale' and 'exchange' are not to be read any differently. Compare Helvering v. Hammel, 311 U. S. 504, ante, 303, 61 S. Ct. 368, 131 A.L.R. 1481; Fairbanks v. United States, 306 U.S. 436, 83 L.Ed. 855, 59 S. Ct. 607; Burnet v. Harmel, 287 U. S. 103, 77 L. Ed. 199, 53 S. Ct. 74. *Neither term is appropriate to characterize the demolition of property and subsequent compensation for its loss by an insurance company. Plainly that pair of events was not a sale.* Nor can they be regarded as an exchange, for 'exchange' as used in § 117 (d), implies reciprocal transfers of capital assets, not a single transfer to compensate for the destruction of the transferee's asset."

In *Boyer v. State,* 19 Wn. (2d) 134, 142 P. (2d) 250, the court said:

"The second situation mentioned above, where the statute would apply, it, likewise absent here. The state has not *sold or leased* these tidelands to the city of Seattle. By chapter 177, Laws of 1929, it made an absolute gift to the city.

"A sale of property contemplates a consideration, or

price, seller, a purchaser, and a delivery of the thing sold. For a list of cases defining the words "sale" and "sell", in conformity with the definition just given, see 38 Words & Phrases (Perm.ed.) pp. 99, 562. In Spokane v. Baughman, 54 Wash. 315, 103 Pac. 14, the question arose as to whether the serving of intoxicating liquors by a social club to its members at a price fixed by the club and charged to the account of the members constituted a *sale* within the meaning of an ordinance regulating the sale of such liquors. In answer to that question, this court said:

" 'A sale has been defined by Kent as an agreement by which one of two contracting parties, called the seller, gives a thing and passes the title, *in exchange for a certain price in current money,* to the other party, who is called the buyer or purchaser, who on his part agrees to pay such price. It is defined in a more condensed statement by Blackstone as a transmutation of property from one man to another *in consideration of some price or recompense* in value.'

"*In the disposition which the state made of these tidelands the essential elements of a sale are lacking.* The state was not a seller, the city was not a purchaser, and *there was no consideration, or price, paid* or contemplated. The statute upon which the state now relies does not fit the situation presented here and is not applicable to it."

See also to the same effect:

Williamson v. Berry, 8 How. 495, 12 L.Ed. 1170, 1191;
Colyear v. Krakauer, 122 App. Div. 797, 107 N.Y.S. 739;
Washington v. Ogden, 1 Black (U.S.) 450, 17 L.Ed. 203;
Hartwig v. Rushing, 93 Ore. 6, 182 Pac. 177;
Close v. Browne, 230 Ill. 228, 82 N.E. 629, 13 L.R.A. NS 634;
State v. Colonial Club, 154 No. Car. 177, 69 S.E. 771,

31 L.R. A. (NS) 371, Ann. Cas. 1912A 1079;
Union Securities v. Merchants Funds and Savings Co., 205 Ind. 127, 185 N.E. 150, 186 N.E. 261, 95 A.L.R. 1189;
47 Am. Jur. 216, 217, sec. 14.

App. N. (78)

SUBJECT TO TOTAL $10,000.00 MAXIMUM LIMITATION,—LIST OF MAXIMUM INDIVIDUAL LIABILITY

Name	*Maximum Liability*	*Basis Therefor*	*Cash or Replacement*
Albrecht, Mrs. Earnest	$ None	Receipt	None
Andrews, Mabel	$150.00	Receipt & Proof of Loss	$ 87.33
Arteel, Mrs. W. J.	180.00	Rec. & P. L.	180.00
Babcock, Mrs. Ralph	10.00	P. L.	58.22
Bair, Mrs. Howard	None	Rec.	None
Balke, Mrs. Emma	None	Rec.	None
Basey, Mrs. Grace	200.00	Rec. & P. L.	116.44
Baur, Hattie	None	Rec.	None
Beauchene, Mrs. A. J.	None	Rec.	None
Beerman, Mrs. W. H.	200.00	Rec. & P. L.	200.00
Belaire, Mrs. Victor	200.00	P. L.	116.44
Bell, Doris Benoit	200.00	Rec. & P. L.	200.00
Bitter, Mrs. Gregory	200.00	Rec. & P. L.	200.00
Bloxom, Mrs. Merritt	200.00	Rec. & P. L.	200.00
Bobst, Mrs. Mae	150.00	Rec. & P. L.	87.33

Bodine, Florence	150.00	Rec. & P. L.	87.33
Brimmer, H. V.	200.00	Rec. & P. L.	116.44
Brown, Mrs. Fred F.	185.00	Rec. & P. L.	106.91
Bryson, Irene	200.00	Rec. & P. L.	200.00
Burke, Barbra G.	125.00	Rec. & P. L.	125.00
Busby, Mrs. Thomas	200.00	Rec. & P. L.	116.44
Buttke, W. H.	200.00	Rec. & P. L.	200.00
McNab,			
Helen Campbell	150.00	Rec. & P. L.	150.00
Carman, Mrs. Rex	None	Rec.	None
Cast, Mrs. Harold	None	Rec.	None
Chadwick, R. E.	150.00	Rec. & P. L.	150.00
Chance, May	100.00	Rec. & P. L.	100.00
Clarke, Glen L.	150.00	Rec. & P. L.	150.00
Clements, James	None	Rec.	None
Conkey, A. L.	250.00	Rec. & P. L.	145.55
Cox, Alice	100.00	Rec. & P. L.	58.22
Cronholm, Mrs. A. L.	200.00	Rec. & P. L.	116.44
Dasdice, J. A.	200.00	Rec. & P. L.	116.44
Dawson, Mrs. F. C.	500.00	Rec. & P. L.	600.00
	100.00	Rec. & P. L.	
Densmore, Mrs. W.	150.00	Rec. & P. L.	150.00
Dewar, Gladys N.	150.00	Rec. & P. L.	150.00
Dormaier, C. C.	200.00	Rec. & P. L.	200.00
Draper, Wm. C.	200.00	Rec. & P. L.	200.00
Edwards, Mrs. Floyd C.	50.00	Rec. & P. L.	50.00
Erickson, O. H.	200.00	Rec. & P. L.	200.00

Eschbach, Mrs. Ed.	100.00	Rec. & P. L.	58.22
Etl, Lillian	200.00	Rec. & P. L.	116.44
Eyman, Mrs. Chas.	200.00	Rec. & P. L.	200.00
Fetherstone, Mrs. J. E.	200.00	Rec. & P. L.	116.44
Fiebelkom, Hazel	25.00	Rec. & P. L.	14.56
Flater, Mrs. Mabel	250.00	Rec. & P. L.	250.00
Fleming, Mrs. Del	100.00	P. L.	58.22
Foran, Ruth	300.00	Rec. & P. L.	300.00
Fortier, Mrs. Geo.	200.00	Rec. & P. L.	200.00
Fox, Mrs. H. R.	150.00	Rec. & P. L.	87.33
Fraser, Mrs. Ronald	200.00	Rec. & P. L.	200.00
Fuqua, A. E.	150.00	Rec. & P. L.	150.00
Gannon, Gertrude	150.00	Rec. & P. L.	87.33
Goetz, W.	150.00	Rec. & P. L.	87.33
Griffith, Mrs. A. G.	150.00	Rec. & P. L.	150.00
Hagne, Harold J.	None	Rec.	None
Hall, Angeline	100.00	Rec. & P. L.	100.00
Hamilton, J. C.	175.00	Rec. & P. L.	175.00
Hanrathy, Agnes M. (now Mrs. Joe J. Sullivan, Jr.	200.00	Rec. & Release	200.00
Harnden, W. G.	None	Rec.	None
Hartman, Dean	150.00	Rec. & P. L.	150.00
Hayes, C. P.	200.00	Rec. & P. L.	116.44
Herrette, Minerva	150.00	Rec. & P. L.	150.00
Hillmer, Beatrice	200.00	Rec. & P. L.	116.44
Holtzinger, C. R.	200.00	Rec. & P. L.	116.44

Hornsberger, A.	75.00	Rec. & P. L.	75.00
Jarvis, Helen	180.00	Rec. & P. L.	180.00
Johnson, Fred E.	150.00	Rec. & P. L.	150.00
Jahr, Edna C.	140.00	Rec. & P. L.	140.00
Jones, M. W.	200.00	Rec.	116.44
Junker, Elizabeth	100.00	Rec. & P. L.	58.22
Kinney, C. H.	200.00	Rec. & P. L.	200.00
Kious, Mrs. Vernon	225.00	Rec. & P. L.	131.00
Knight, Ida	200.00	Rec. & P. L.	200.00
Krause, Mary Alice	150.00	Certificate	87.33
Leach, E. E.	200.00	Rec. & P. L.	200.00
Lisle, Ivan B.	200.00	Rec. & P. L.	116.44
Logozzo, Elsie	None	Rec.	None
Lowenthal, Carl	200.00	Rec. & P. L.	200.00
Lyon, W. F.	150.00	Rec. & P. L.	150.00
Mace, Clark	125.00	Rec. & P. L.	125.00
Magee, Patricia	100.00	Rec. & P. L.	100.00
Martinez, M. J.	200.00	Rec. & P. L.	116.44
McCorkindale, Elaine	200.00	Rec. & P. L.	200.00
McGilvery, G. F.	200.00	Rec. & P. L.	200.00
Meek, Elenor	200.00	Rec. & P. L.	200.00
Mercke, J. W.	200.00	Rec. & P. L.	200.00
Meser, Lucille H.	200.00	Rec. & P. L.	116.44
Metzger, Bee	None	Rec.	None
Miller, H. R.	300.00	Rec. & P. L.	174.66
Mixon, Betty	75.00	Rec. & P. L.	75.00
Mixon, Louise	100.00	Rec. & P. L.	100.00

Moore, J. D.	None	Rec.	None
Morrill, Florence	None	Rec.	None
Marse, Mrs. Opal	150.00	Rec. & P. L.	87.33
Munsil, L. W.	None	Rec.	None
Nelson, Mrs. Elmer R.	150.00	Rec. & P. L.	150.00
Odell, Harry	None	Rec.	None
Orth, J. E.	None	Rec.	None
Palmer, F. C.	400.00	Rec. & P. L.	500.00
	100.00	Rec. & P. L.	
Patnode, Mrs. Mose	135.00	Rec. & P. L.	135.00
Peterson, Laura	200.00	Rec. & P. L.	116.44
Pollard, H. E.	100.00	Rec. & P. L.	58.22
Poulter, Merle	150.00	Rec. & P. L.	150.00
Pulos, Ada	100.00	Rec. & P. L.	100.00
Reich, Mrs. Wm.	None	Rec.	None
Reischl, Irene	200.00	Rec. & P. L.	116.44
Richards, Gordon	200.00	Rec. & P. L.	116.44
Ritchie, Clarence	200.00	Rec. & P. L.	200.00
Robinson, K. G.	75.00	Rec. & P. L.	75.00
Ross, Nan	200.00	Rec. & P. L.	200.00
Ryker, Rodney	200.00	Rec. & P. L.	200.00
Schmidt, G. A.	200.00	Rec. & P. L.	200.00
Schmidt, Mrs. Rudolph	200.00	Rec. & P. L.	116.44
Schoonover, Jack	200.00	Rec. & P. L.	200.00
Shaw, Verda Gayle	75.00	Rec. & P. L.	75.00
Shirran, W. C.	200.00	Rec. & P. L.	200.00
Souther, Frank	None	Rec.	None

Spinner, H. R.	200.00	Rec. & P. L.	200.00
Stanley, Dorothea	200.00	Rec. & P. L.	200.00
Stanley, Gladys	150.00	Rec. & P. L.	150.00
Stoltenow, B. W.	100.00	Rec. & P. L.	100.00
Stuart, Agnes M.	None	Rec.	None
Stumpf, John H	250.00	Rec. & P. L.	145.55
Taliaferro, Thelma	100.00	Rec. & P. L.	100.00
Thacker, Cecil	86.04	Release	86.04
Thomas, David G.	100.00	Rec. & P. L.	58.22
Thomas, Elmer	None	Rec.	None
Thompson, J. C.	200.00	Rec. & P. L.	116.44
Tilton, Mrs. Rex	None	Rec.	None
Timpke, Glen D.	200.00	Rec. & P. L.	200.00
Verd, Mrs. Chas.	None	Rec.	None
Vivian, James	None	Rec.	None
Wait, Carlyle	None	Rec.	None
Walsh, C. J.	200.00	Rec. & P. L.	200.00
Warner, A. K.	250.00	Rec. & P. L.	250.00
Weihl, Wright	200.00	Rec. & P. L.	116.44
Williams, D. A.	150.00	Rec. & P. L.	87.33
Wilson, Ed.	200.00	Rec. & P. L.	200.00
Wright, Delbert	100.00	Rec. & P. L.	100.00
York, Paul F.	350.00	Rec. & P. L.	350.00
	TOTAL $20,531.04		TOTAL $17,403.02